Supreme Court, U.S.
FILED

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No. _____

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In the
**Supreme Court of the United States**
October Term, 1997

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**Carl T. C. Gutierrez,** official capacity, et al.,
*Petitioners.*

v.

**Guam Society of Obstetricians and Gynecologists,** et al.,
*Respondents.*

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**On Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For the Ninth Circuit,**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court below erred by doubling the fee awarded against the officials of the Government of Guam on the basis of factors already considered in the enhanced loadstar fee.

2. Whether the court below erred by approving the use of a multiplier to double an already enhanced lodestar fee, absent a showing of actual difficulties in finding counsel.

3. Whether the lower court erred by doubling fees because the legislature passed an unconstitutional law and the Governor of Guam did not veto it.

4. Whether the lower court erred by approving fees to the American Civil Liberties Union-Reproductive Freedom Project (hereafter ACLU/RFP) at the rates of the largest New York City law firms rather than at prevailing market rates in the relevant legal community of Guam absent a showing that local counsel was unavailable.

## LIST OF PARTIES

The following are the named plaintiffs in this suit (respondents herein) :

Guam Society of Obstetricians and Gynecologists; Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; William S. Freeman, M.D.; and John Dunlop, M.D..

The following people were originally named as defendants in their personal and official capacities:

Joseph F. Ada, Governor of Guam; Elizabeth Barrett-Anderson, Attorney General of Guam; Leticia Espaldon, Director of the Department of Public Health and Social Services; and George B. Palican.

In the court below, on the issue of attorney's fees which is the subject of this peittion, the following were defendants: Carl T.C. Gutierrez, in his official capacity as Governor of Guam; the Director of the Department of Public Health & Social Services for the Territory of Guam; the Administrator of the Guam Memorial Hospital Authority; the Attorney General of the Territory of Guam; and the Members of the Guam Election Commission.

Originally, the suite named as defendants, in their official capacities, the persons who filled the above listed positions. However, none of these people presently hold the offices listed. Therefore, except for the substitution of the name of the current Governor, the official titles are substituted for the names of the individuals.

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A. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam Jan. 25, 1991)

B. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 5 F.3d 536 (9th Cir. 1993) (mem.)

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C. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam Dec. 10, 1993)

D. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam Dec. 28, 1993)

E. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 100 F.3d 691 (9th Cir. 1996)

F. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, slip op. (9th Cir. May 19, 1997)

## CITATION OF THE REPORTS OF THE OPINIONS AND ORDERS IN THE CASE BY THE COURTS BELOW

The original case on the merits of the action is *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 776 F.Supp. 1422 (D. Guam 1990), *aff'd* 962 F. 2d 1366 (9th Cir. 1992), *cert. denied*, 505 U.S. 1011 (1992).

The case on the issue of attorney fees is *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam June 25, 1991) [Appendix A]; vacated and remanded 5 F.3d 536 (9th Cir. 1993) (mem.) [Appendix B1]; decision and order after remand No. 90-00013 (D. Guam Dec. 10, 1993) [Appendix C], *aff'd* 100 F.3d 691 (9th Cir. 1997) [Appendix E], *reh. denied* slip op. (9th Cir. May 19, 1997) [Appendix F].

## JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on November 7, 1996. A timely petition for rehearing was denied on May 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The basis for federal jurisdiction in the court of first instance is 42 U.S.C. §1983; 28 U.S.C. §§ 1291, 2107.

## STATUTES

42 U.S.C. §1988 (b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [42 U.S.C.A. §1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bbet seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et sq.], or section 1381 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

## STATEMENT OF THE CASE

On March 8, 1990 the Guam Legislature passed Bill 848, the "most restrictive anti-abortion law enacted under the U.S. flag." *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam Dec. 10, 1993) at 7 [Appendix C]. (CR 340 at 7).[1] The bill was passed in spite of a well written opinion letter written by the Attorney General of Guam advising the legislature that the law was clearly unconstitutional. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 100 F. 3d 691, 718 (9th Cir. 1996) [Appendix E].[2]

Even before the bill was signed into law by the Governor of Guam, the ACLU/RFP and the law firm of Arriola Cowan and Bordallo (hereinafter AC&B) were developing a litigation strategy and working on the brief. (CR 275, para. 7, exhibit A; CR 258, exhibit C). On or about March 18, 1990, the director of RFP traveled to Guam in order to present Governor Ada with constitutional arguments against signing the anti- abortion bill into law and to assist AC&B in bringing a challenge to

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[1] The author of the bill, Senator Belle Arriola, is the mother of Anita Arriola, then an associate in the law firm representing plaintiffs. J. Arriola, a senior partner in the plaintiffs' law firm, is her father.

[2] The Attorney General, who is appointed by the Governor of Guam, is also a defendant in this case.

the statute in federal court. (CR 275, para 7.) The Governor signed the bill into Law on March 19, 1990.

On March 23, two weeks after passage of the law, the complaint and motion for temporary restraining order were filed. (CR 7.) The parties stipulated to a continuing temporary restraining order until the trial on the merits. (CR 12.) The initial reaction of the judge of the District Court of Guam to the underlying controversy was as follows: "I would have to say that [in] eight years on the bench, this is the easiest issue that I've ever been confronted with." R.T. 3-26-90, CR 18, at 7. *Guam Society of Obstetricians And Gynecologists*, 100 F.3d 691, 704 (9th Cir. 1996) (Kozinski, J. dissenting) [Appendex E].

In conjunction with the motion for summary judgment, Plaintiffs submitted the declaration of Robert F. Rogers, PH.D., professor of political science at the University of Guam to show how unpopular the abortion statute was with Guam voters. Rogers conducted a nonpartisan public opinion survey and came to the conclusion that "Contrary to conventional wisdom, Guam is apparently not overwhelmingly 'pro-life'." CR. 116 Ex. V. Rogers found that 40% percent of the voters on Guam were opposed to the Governor signing the abortion bill. He rated his poll as accurate within 4%.

There was no trial or evidentiary hearing in this case. The Judge's initial sentiments regarding the

simplicity of the case were echoed in his written opinion granting the Plaintiffs' summary judgement; "After the emotionalism and stridency of opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade* the law in the Territory of Guam?" *Guam Society of Obstetricians and Gynecologists v. Ada*, 776 F.Supp. 1422, 1426 (D. Guam 1990). The district court made clear that it did not have to grapple with difficult legal theories or lines of conflicting case law when arriving at the decision. In fact, the Judge contended that the Governor's argument had "no known precedent in American jurisprudential history". *Id.*

The same judge who found the case so easy to decide and devoid of legal merit proceeded to award plaintiffs' counsel $552,000.00 in legal fees. The fee award included a substantial enhancement of the hourly rate of the members of the firm: A. Arriola's standard rate of $120.00 enhanced to $175.00, Cowan's standard rate of $130.00 to $195.00 and J. Arriola's standard rate of $130.00 enhanced to $195.00. (Cr 258, para 19.). The request was based on the claim that the case was factually and legally difficult. (CR 258, para 21, 22.) It also included a request for multiplier to double the loadstar fee, in part to compensate for the contingent nature of the case.

The Territory of Guam appealed and the Ninth Circuit vacated the award due to the intervening case of

*City of Burlington v. Dague*, 505 U.S. 559 (1992). *Guam Society of Obstetricians and Gynecologists v. Ada*, 5 F.2d 536 (9th Cir. 1993) (mem) [Appendix B1].

On remand, the District Court reinstated the fee award in full including the multiplier doubling fees. The court gave the following reasons for its decision to reinstate the award in full:

> After due consideration the court declines to lessen the multiplier of two or otherwise alter its original award. While the risk of the contingent fee did factor into the court's first decision, the more important considerations as reflected in the decision, were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case and the rare and exceptional nature of the case particularly in the small island community of Guam."

(CR 340 at 6). The court's finding that the case was extremely undesirable is belied by evidence presented by plaintiffs that 40% of Guam voters were apposed to the statute.

Attorney General Elizabeth Barrett-Anderson appointed by the Governor of Guam was named as a defendant in this case her personal as well as official capacity even though she took the position from the beginning that the law was unconstitutional. Other defendants such as Leticia Espaldon head of the De-

partment of Public health had to retain private counsel because they differed with the Attorney General as to whether the law was constitutional or not. CR 288 at 2. Contrary to the assertion of AC&B, the legal community rallied behind the firm's efforts. The only evidence in the record that anybody had difficulty getting a lawyer was presented on behalf of defendant Leticia V. Espaldon. The declaration of Attorney General Barrett-Anderson stated that it was extremely difficult to find any attorney on Guam willing to represent Espaldon primarily because of the personal beliefs of the attorney's on Guam. Patrick Wolff, who had family ties to Espaldon, was finally persuaded to represent her. *Guam Society*, 100 F.3d at 717 n.37 [Appendix E]. (CR 288 at 2.)

The record is devoid of evidence that any of the plaintiffs in this action experienced actual difficulties obtaining an attorney to represent them. In fact, one of the plaintiffs, Laurie Konwith, was approached by a member of the AC&B firm to become a plaintiff in the case. (CR 295, pg 5.) Konwith did not seek other counsel to represent her in the case. (CR 295, pg 5-6.) Konwith had a written agreement with AC&B concerning costs and an oral agreement regarding fees with the ACLU and AC&B. (CR 295, pg 6-7.) Konwith testified at her deposition that it was her understanding that she had no financial responsibility for the lawsuit. (CR 29,5 p. 7.) Plaintiff Howard Cole did not seek other representation before asking to become a plaintiff in the case. (CR 296,

p.5.) Cole did not have a written fee agreement with AC&B or the ACLU. (Cr 296, 7.) Cole was informed by the ACLU that they take public interest cases and that they did not bill the people they represent. (CR 296, 9.) ACLU/RFP attorney, Simon Heller gave Cole the impression that the case could not be lost. (CR 296, p.10.)

The court further noted that the multiplier was appropriate in this case in part due to the "novel legal aspects it presented as the most restrictive anti-abortion law enacted under the U.S. flag." *Guam Society*, No. 90-00013 (D. Guam Dec. 10, 1993) at 7 [Appendix C]. (CR 340 at 7). Thus, the court "double counted" by enhancing the hourly rate due to the difficulty of the case and again considering it as a factor in applying the multiplier. In addition, the court awarded an additional $7,615.80 which constituted time and costs spent on preparing the second fee application. As the dissent notes, "...I see no justification for charging the defendants for preparing the first (erroneous) fee application and then again for its success". *Guam Society*, 100 F.3d at 706, n.7 (Kozinski, J. dissent) [Appendix E].

## ARGUMENT

**I. The District Court of Guam improperly doubled the attorney fees of AC&B to compensate for factors that are subsumed in the loadstar by the enhanced hourly rate.**

A prevailing party in a civil rights action is entitled to an award for a reasonable attorney's fee pursuant to § 1988. However, this Court has made it clear that fee awards should not result in a "windfall" to counsel and that fee shifting statutes were not "designed as a form of economic relief to improve the financial lot of lawyers." *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *City of Burlington v. Dague*, 505 U.S. 557, 562-63 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S.456, 565 (1986) (*Delaware Valley I*). This Court has established a "strong presumption" that the lodestar represents the reasonable fee. *Dague*, 505 U.S. at 562.

Ignoring this Court's admonitions in *Dague, supra*, the District Judge and the Ninth Circuit bestowed a windfall to counsel by doubling fees for a total of $552,000.00 plus interest. The exorbitant fee awarded to counsel who prevailed in what Circuit Judge Kozinski called this "laughably easy" case "is not reasonable compensation for services prudently rendered; it is a bounty paid to plaintiffs' lawyers for having reeled in a fat and rather sluggish fish." *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 100 F.3d 691, 705 (9th Cir. 1996) (Kozinski, J. dissent) [Appendix E].

The district court arrived at this extravagant sum by using factors such as the "undesirability" of the case and the "novel legal aspects it presented" to enhance the fee of AC&B twice. First, to calculate a reasonable hourly fee and again to justify the award of double fees. *Guam*

*Society*, No. 90-00013 (D. Guam Dec. 10. 1993) at 6, 7 [Appendix C]. (CR 340 at 6, 7.) Thus, the district court and the majority of the Ninth Circuit, ignored this Court's holding that a lodestar may not be enhanced based upon the difficult nature of a case, because difficulty is necessarily reflected in a reasonable hourly rate times a reasonable number of hours. *Dague*, 505 U.S. at 562-63, citing *Delaware Valley I*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 898 (1984).

Circuit Judge O'Scannlain writing for the dissent from the order rejecting the petition for rehearing and suggestion for rehearing *en banc* in *Guam Society* found that the district judge's award in this case "flies straight in the face" of the Supreme Court's prohibition on double counting fees.

> This case called upon the district court to decide whether Guam's ban on abortions was unconstitutional under *Roe v. Wade*-not exactly rocket science. The district judge considered it "the easiest issue that [he'd] ever been confronted with." Plaintiffs' counsel never-theless claimed that 1,487 billable hours were reasonably necessary to secure this judicial breakthrough. Surprisingly, the district judge agreed, and awarded counsel $175 for each of those 1487 hours. Our divided court affirmed the award, citing statements of Guam attorneys that $175 per hour or more was reasonable

given the "magnitude and controversy" of the case and "the considerable hostility the suit engendered in the community."

In my view, this kind of bounty to litigate the self evident proposition that Guam's ban on abortion violates *Roe* creates perverse incentives for attorney's to run up hours in cases that barely pass the laugh test. As if that were not enough, however, the district court proceeded to double the amount, producing a total award of $443,642.56.

. . .

A district court simply cannot use the difficult and controversial nature of a case both to calculate a reasonable fee and then to enhance it. It's called "double counting," and it's not allowed. *Dague*, 505 U.S. at 562-63. The Supreme Court explained in no uncertain terms that a district judge may not enhance the lodestar based on difficulty because difficulty necessarily is reflected in a reasonable hourly rate or a reasonable number of hours. *Blum*, 465 U.S. at 898-99. A district judge likewise may not enhance the lodestar due to undesirability after he inflates the hourly rate to reflect undesirability.

*Guam Society*, slip op. (9th Cir. May 19, 1997) at 5756-57 (O'Scannlain, J. dissent) [Appendix F].

The District Judge in the instant case used the difficult and controversial nature of the case to award a substantial enhancement to the normal hourly rates charged by AC&B and then used the same justification to double the fees. The resulting award of $552,000.00 for prevailing on a summary judgment motion is clearly not what Congress intended by a reasonable attorney fee.

The decision of the Ninth Circuit directly conflicts with the Supreme Court decision in *City of Burlington v. Dague*, 505 U.S. 559 (1992) and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) (*Delaware Valley I*). The decision of the lower court directly conflicts with decision in the Fifth Circuit in *Walker v. U.S. Dept. of Housing and Urban Development*, 99 F.3d 761 (5th Cir. 1966). The interpretation of the federal fee shifting statute, 42 U.S.C. §1988, to permit the use of a multiplier to double the loadstar fee is a matter of national application in which there is a need for uniformity.

## II. The Court improperly considered the undesirability of the case absent a showing of actual difficulties in finding local counsel

The Ninth Circuit has approved the use of a multiplier where the undesirability of a case created an actual

difficulty for the plaintiff to obtain counsel. In *Fadhl v. City and County of San Francisco*, 859 F. 2.d. 649 (9th Cir. 1986) plaintiff approached 35 attorneys before she found one who would take her case. *Id.* at 651. The plaintiff in *Bouman v. Block*, 940 F.2d 1211, 1236 (9th Cir 1991) *cert. denied* 502 U.S. 1005 (1991) was turned down by 16 attorneys before retaining counsel.

The facts in the instant case differ markedly from *Fadhl* and *Bouman* where plaintiffs showed actual difficulty in retaining counsel. The ACLU/RFP and the firm of AC&B were working on the case even before the law was passed. The attorneys approached one of the plaintiffs to become a plaintiff. As Judge Kozinski notes in his dissent: "This is not a case where plaintiffs tried to get a lawyer but were repeatedly rebuffed". Nonetheless, the majority held a multiplier was justified because proof of actual difficulty in finding counsel is not necessary. *Guam Society*, 100 F.3d at 697-698 [Appendix E].

The Ninth Circuit speculated that it was "unlikely" that plaintiffs could have found other representation because the affidavits of Guam attorneys such as Brad Klemm expressed the opinion that it was "unlikely" that the other qualified attorneys would have taken the case were more credible than the affidavits of Guam attorneys such as Linda Ingles who stated she did not believe "that the ACLU and the Plaintiffs would have experienced difficulty in obtaining local counsel." *Id.* at 698.

The absurdity of the majority's conclusion can best be explained by the following quote:

> A district court's factual findings are reviewed in light of the record, not speculation. Although one could speculate that other attorneys on Guam might have agreed to represent Plaintiffs if offered the opportunity because lawyers have a moral obligation to represent those with unpopular views and might be able to sign a million dollar book deal when the case is over (Dissent at 717 n.38), one could just as easily speculate that only a lawyer with a strong pro-choice philosophy and extensive public interest law experience would have taken this case, of which one could speculate there are few on Guam. However as judges, we are not permitted to engage in speculation. We are confined to the evidence in the record and those inferences that directly follow from that evidence.

*Id.*

While going to great lengths to say that judges should not engage in speculation, the majority does just that by ignoring the direct testimony of the plaintiffs themselves which established that they had no difficulty finding local counsel in favor of affidavits which "speculate" whether plaintiffs would have difficulty in finding counsel if AC&B had not taken the case. The Ninth

Circuit majority in this case apparently believes that even in cases where the plaintiff hires the first attorney consulted, double fees can be awarded if affidavits speculating on the unavailability of other counsel are submitted to the court.

The holding of the Ninth Circuit should be reversed. The type of speculative and "anecdotal" evidence which was relied upon in this case has been rejected by this Court in *Department of Labor v. Triplett*, 494 U.S. 715 (1990).

> As to the first issue-unavailability of attorneys-the court relied upon three lawyers' assessments. One stated that "fewer qualified attorneys are accepting black lung claims," and that more claimants are proceeding pro se. 180 W.Va., At 541, 378 S.E.2d, at 90. According to a second attorney, "few attorneys are willing to represent black lung claimants." *Ibid.* A third lawyer's evaluation was not contained in the record but consisted of his 1985 testimony to the House subcommittee that "many of his colleagues had'...stated unequivocally that they would not take black lung cases....' " *Id.*, at 542, 378 S.E.2d, at 91 (citations omitted)
>
> . . .
>
> We made clear in Walters that this sort of anecdotal evidence will not overcome the pre-

> sumption of regularity and constitutionality to which a program established by Congress is entitled. 473 U.S., at 324, n.11,105 S.Ct., at 3190, n. 11. The impressions of three lawyers that the current system has produced "few" lawyers, or "Fewer Qualified Attorneys" (whatever that means) and that "many" have left the field, are blatantly insufficient to meet respondents burden of proof, even if entirely unrebutted. *Id.* at 723-724.

Furthermore, the majority decision in *Guam Society* directly conflicts with established decisional law in other circuits. The court of appeals in *King v. Palmer*, 950 F. 2d 771 (D.C. Cir. 1991) relied upon the Supreme Court's opinion in *Triplett*, *supra*, in holding that absent a showing of actual difficulty in finding counsel, affidavits of attorneys unconnected to the case may not be used as a basis for enhancement of the lodestar fee. *King*, 950 F.2d at 779. The plaintiff King, like the plaintiffs in the instant case, did not present evidence of actual difficulties in securing counsel. King retained the first attorney that she contacted. *Id.* at 778. The affidavits of attorneys who were not approached by Ms. King and were never involved in the case were submitted to support the claim that it was unlikely King could have found other counsel. The D.C. Circuit *en banc* rejected the affidavits as meeting the substantial difficulties test:

> Without in any way denigrating the bona fides of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative or even weighty the substantial difficulties test would be met so easily as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. See *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 1433-34, 108 L. Ed. 2d 701 (1990) (holding such evidence to be "blatantly insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted.")

*Id.* at 779.

The court also rejected the affidavits from attorneys who "hypothesized" whether the affiant would have taken the case. *Id.* The affidavits in the instant case are of the same speculative and hypothetical nature as those rejected by the D.C. Circuit Court of Appeals in *King*.

In *Huntington Branch, N.A.A.C.P. v. Huntington, N.Y.*, 961 F.2d 1048 (2nd Cir. 1992), the district court awarded a 75% enhancement of the lodestar fee in a civil rights suit. The enhancement was based upon "conclusory affidavits" by lawyers as to whether the plaintiff could

have had difficulty finding counsel. There were no facts in the record which showed that the plaintiff had actual difficulties in finding counsel. The Second Circuit Court of Appeals reversed the 75% enhancement which had been applied to the fees of both private counsel and the NAACP attorney. *Id.* at 1049.

The Fifth Circuit has held that the undesirability of the case is one of the factors subsumed in the lodestar. *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996). The court further noted that it is questionable whether a district court may use a multiplier as punishment under §1988.

The decision of the Ninth Circuit in this case directly conflicts with existing decisions of the Second and D.C. Circuits which hold that the prevailing party must show actual difficulties in finding counsel before a multiplier can be awarded. *Huntington Branch, N.A.A.C.P. v. Huntington, N.Y.*, 961 F.2d 1048 (2nd Cir. 1992); *King v. Palmer*, 950 F.2d. 771 (D.C. Cir. 1991), *cert. denied*, 505 U.S. 1229, (1992). The applicability of a multiplier in connection with 28 U.S.C. § 1988, a federal fee shifting statutes, is a matter of national application in which there is a need for uniformity.

**III. The lower Court application of a multiplier of two resulted in a fee award that is unreasonable and punitive in nature.**

Ninth Circuit Judge O'Scannlain states in his dissent "I cannot tell whether our circuit has rejected the Supreme Court's moratorium on double counting for 'controversial cases' or just allowed political correctness to run amok." *Guam Society*, slip op. (9th Cir. May 19, 1997) at 5758 (O'Scannlain, J. dissent) [Appendix F]. The award of fees in this case is so exorbitant that one can only conclude that the district court and the majority of the Ninth Circuit consider it is appropriate to "punish" the taxpayers of Guam because the Guam Legislature passed an unconstitutional statute pertaining to abortion and the Governor of Guam failed to veto it. One cannot help but wonder if the court would have made such an award if the issues in the underlying case were not so volatile and controversial in nature.

Federal fee shifting statutes such as §1988 were not intended to be used to punish taxpayers for the errors of their elected representatives. The intent was to provide reasonable compensation to attorneys for taking civil rights cases. *Delaware Valley I*, 478 U.S. 546, (1986). The loadstar fee includes most, if not all, factors constituting a reasonable attorney fee. *Id.* at 566. The exception to this rule is a tiny one and courts should not permit the exception to eclipse the rule. *Arrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir 1996); *Lipsett v. Blanco*, 975 F.2d 934 (1st Cir. 1992). It is questionable whether a district court may use a multi-

plier as punishment pursuant to §1988. *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996).

The issue of whether fees may ever be doubled after the case of *City of Burlington v. Dague*, 505 U.S. 559 (1992), is an important question of federal law which has not been but should be clarified by the Supreme Court of the United States.

## IV. The lower Court erred by calculating the fees of the ACLU/RFP at New York rates

The lower court approval of the fee awarded to the ACLU/RFP directly conflicts with the Sixth Circuit's decision in *Hadiz v. Johnson*, 65 F.3d 532 (6th Circuit 1995). The Sixth Circuit refused to approve the hourly rate of an out of town specialist in a case where the record was devoid of any suggestion that any attempt was made to retain counsel in the local market. Hourly rates should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation. *Id.* at 536. The court found that there was no reason to believe that out of town counsel should receive more than local counsel. *Id.*

Reasonable fees under § 1988 are calculated according to the prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993); *Hadiz v. Johnson*, 65 F.3d 523 (6th Cir. 1995); *Walker v.*

*U.S. Dept. of Housing & Urban Development*, 99 F. 3d 761 (5th Cir. 1996). Some circuits, including the Ninth Circuit, have made an exception where local counsel is not available. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). However, in the instant case, it is clear that a local firm, AC&B was available to represent the plaintiffs. There is no reason given why outside counsel should have received higher hourly rates than those awarded local counsel AC&B.

The district judge has a duty to review a fee award as to reasonableness and base its findings on evidence in the record even when a fee application is unopposed. *Stewart*, 987 F.2d at 1453; *Neft v. Vidmark, Inc.*, 923 F.2d 746 (9th Cir. 1991). The district judge failed to articulate any basis for his determination that a public interest group should be awarded fees based on large New York City firm rates. The award at New York rates is unreasonable and exorbitant. By permitting the award to stand, the lower court has ignored Supreme Court as well as Ninth Circuit precedent.

> It is to forestall such gorging at the ligation trough that the Supreme Court requires district courts to "provide a concise but clear explanation of [their] reasons for [a] fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.E. 2d 40. We have interpreted this as requiring "something more tha[n] a bald, unsupported amount." 977 F.2d at 1306. Else-

> where it's been said that the district court "has to make a judgment...in a reasoned (though brief) opinion-on what the case should have cost the party who submitted the request." *Heiar v. Crawford County, Wis*, 746 F.2d 1190, 1204 (7th Cir. 1984), cert. denied, 472 U.S. 1027, 105 S.Ct. 3500, 87 L. Ed. 2d 631 (1985).

*Guam Society*, 100 F.3d at 710 [Appendix E].

The ACLU/RFP submitted a fee request based upon rates charged by two of the largest law firms in New York. It did not submit any evidence of what the ACLU/RFP normally charges in cases such as this one. Both of these firms are ten times larger than ACLU/RFP. CR 299 and 269 (Wm. Josephson and J. Hall Decls.) The government opposed the rates requested by ACLU/RFP and gave support for their opposition in the form of an unreported decision from the U.S. District Court for the District of Utah where fees were awarded to the same ACLU/RFP attorneys as appeared in the Guam case. In the case challenging the Utah abortion act, the Judge reduced the hourly rate for Ms. Benshoof from a claim of $335 to $155; for Ms. Pine from a claim of $310 to an allowed rate of $125; and for Mr. Heller, from a claimed rate of $285 to $105. *Jane L., Utah Women's Clinic and David Hansen, et al. v. Bangarter*, Civ. No. 91-C-345G, Memorandum Decision and Order in re Attorneys Fees, p.17, fn. 16, App. A, Plaintiffs Award (C.C. Utah, June 29, 1993). This case was

brought to the District Court's attention on remand. That decision is the only evidence in the case of the rates actually awarded to ACLU/RFP attorneys. These rates are significantly lower than the fees awarded the same attorneys in this case.

The decision of the Ninth Circuit in this case is in direct conflict with the Supreme Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984) and the Sixth Circuit's decision in *Hadiz v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

## CONCLUSION

For the foregoing reasons, the Government of Guam requests the Supreme Court to grant the petition for Certiorari to review the decision of the Ninth Circuit Court of Appeals:

1. Approving a use of a multiplier to double fees for factors subsumed in the loadstar fee, contrary to the decision of this Court in *City of Burlington v. Dague*, 505 U.S. 112 S. Ct 2638 (1992);

2. Approving the use of a multiplier to double an already enhanced loadstar fee of local counsel, conflicting with the holdings of the Second and D.C. Circuits which require a showing of actual difficulties in finding counsel;

3. Approving the use of a multiplier to arrive at an award which is punitive in nature; and

4. Awarding fees to out of town counsel at large New York City rates which are higher than the prevailing market rates in the relevant legal community of Guam contrary to the decision of this Court in *Blum v. Stenson*, 465 U.S. 886, (1984) and in conflict with the Sixth Circuit in *Hadiz v. Johnson*, 65 F.3d 523 (6th Cir. 1995).

Dated this 15 day of August, 1997.

Respectfully submitted,

CHARLES H. TROUTMAN
Attorney General of Guam (Acting)

By: MARIA G. FITZPATRICK
Assistant Attorney General
Attorney for Petitioners

**IN THE UNITED STATES DISTRICT COURT**
**TERRITORY OF GUAM**

| | |
|---|---|
| Guam Society of Obstetricians and Gynecologists; Guam Nurses Association; The Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; John Dunlop, M.D., on behalf of themselves and all others similarly situated, and all other women patients.<br>*Plaintiffs*,<br><br>v.<br><br>Joseph F. Ada, in his individual and official capacities; Dr. Leticia Espaldon, George B. Palican; Elizabeth Barrett-Anderson; Gloria B. Nelson, Thomas J.B. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael Phillips, as the Board of Directors of Guam Elections Commission, in their official capacities, all others similarly situated,<br>*Defendants* | Civil Case No. 90-00013<br><br>DECISION AND ORDER RE AWARD OF ATTORNEY FEES |

Filed June 25, 1991

THIS MATTER came before the court on June 13, 1991, for hearing of plaintiffs' motion for an award of attorney fees

and costs pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 2412(d), or the Court's general equitable powers.

By decision and order dated August 23, 1990, this Court granted summary judgment in favor of the plaintiffs. The decision found Guam's newly-enacted abortion law[1] unconstitutional under the United States Constitution, Guam's Organic Act, and 42 U.S.C. § 1983. Defendants Governor Joseph F. Ada, Attorney General Elizabeth Barrett-Anderson[2], Dr. Leticia Espaldon[3], and their respective employees, agents, and successors were permanently enjoined in their official capacities, under the Constitution, the Organic Act, and 42 U.S.C. § 1983, from enforcing and/or executing any provision of the law. Plaintiffs thereafter sought an award of reasonable attorney fees and costs as the prevailing party.

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[1] Public Law 20-134, which has been signed into law by Governor Joseph F. Ada on March 19, 1990.

[2] Defendant Attorney General Barrett-Anderson did not submit a memorandum on the issue of attorney fees and costs and did not file a joinder with Defendant Governor Ada's opposition.

[3] Dr. Espaldon is the Director of the Department of Public Health and Social Services for the Territory of Guam.

Also, defendant George B. Palican, the Administrator of Guam Memorial Hospital, agreed by stipulation filed June 25, 1990, "to abide by all injunctions and court orders and . . . be bound by the final judgment or decree in this action." The Guam Election Commission entered into a like stipulation.

**Prevailing Party**

Section 1988 of Title 42 of the United States Code provides in part that in "any action or proceeding to enforce a provision of section[] . . . 1983 . . ., the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." A party prevails when it "'succeed[s] on any significant issue in litigation which achieves some of the benefits the parties sought in bringing the suit'." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1938-39 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

Plaintiffs clearly prevailed in this action, a fact conceded in his memorandum and at oral argument by defendant Governor Ada. The Court's August 23, 1990, decision struck down as unconstitutional sections 2 through 5 of P.L. 20-134 and permanently enjoined the defendants from enforcing the law. Thus, plaintiffs have crossed the "statutory threshold" and "[i]t remains for the district court to determine what fee is 'reasonable'." *Id.*

**Reasonable Costs and Attorney Fees**

In *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988), the Ninth Circuit said:

> The legislative history of § 1988 does not explain what constitutes a 'reasonable attorney's fee, but it does endorse the multi-factor guidelines developed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). **See also** *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d

> 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). The Supreme Court has interpreted this endorsement of a flexible standard by adopting a two-part test to channel the district court's exercise of discretion [to award attorney fees]. Under this "hybrid approach" to the calculation of a reasonable attorney's fee for the prevailing party, courts must first calculate a lodestar amount by multiplying the number of hours reasonable expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Next, the court may increase or reduce the presumptively reasonable lodestar fee (citations omitted), with reference to the *Johnson/Kerr* factors that have not been subsumed in the lodestar calculation (citations omitted).[4]

As noted in *Hensley v. Eckerhart*, **supra**, the Lodestar" attorney fee is:

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[4] The *Johnson/Kerr* factors are 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal services properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) the time limitations imposed by the clients or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the cause; 11) the nature and length of the professional relationship with the client; and, 12) awards in similar cases.

Not all of the *Kerr* factors need be considered if the most relevant factors are discussed and the decision is sufficiently detailed to provide meaningful review. **See** *D'Emanuel v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1385 (9th Cir. 1990). The only firm conclusion the Court has drawn is that each case has its own particular admixture of *Johnson/Kerr* factors.

> ...the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed.

**Id.**, at 433.

The district court should "provide a concise but clear explanation of its reasons for the fee award." **Id.**, at 437.

In their motion for attorney fees and costs, plaintiffs divide their claim for fees and costs into two parts. They first claim attorney fees for work performed and costs incurred during the time period from the initiation of the lawsuit to October 12, 1990, the date of the amended judgment.[5] they

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[5] For the first time period, and after adjustments made in light of certain of defendant Ada's objections, plaintiffs submit their claim for the following hours and rates:

| **Attorneys and Paralegals** | | **Hours** | **Rate** | **Amount** |
|---|---|---|---|---|
| Arriola, Cowan & Bordallo | | | | |
| Anita P. Arriola | 772.35 | $175 | | $135,161.25 |
| Joaquin C. Arriola | 10.20 | $200 | | $ 2,040.00 |
| Mark E. Cowan | 10.70 | $195 | | $ 2,086.50 |
| **American Civil Liberties Union - Reproductive Freedom Project** | | | | |
| Lynn Paltrow | 179.07 | $241 | | $ 43,155.87 |
| Rachel Pine | 17.50 | $241 | | $ 4,217.50 |
| Simon Heller (Attorney Hours) | 379.04 | $135 | | $51,170.40 |
| Louise Melling | 38.50 | $135 | | $ 5,197.50 |
| Ellen K. Goetz | 13.40 | $100 | | $ 1,340.00 |
| Andrew W. Dwyer | 40.00 | $ 80 | | $ 3,200.00 |
| S. Heller (Non-attorney Hours) | 10.50 | $ 25 | | $ 262.50 |

(continued...)

next claim attorney fees for time expended and costs incurred while seeking this award of fees and costs. The Court will address each time period in turn.

**Reasonableness of Total Hours Claimed through Date of Amended Judgment, October 12, 1990**

Defendant Governor Ada directly challenged only 43.3 of the nearly 1,500 hours of attorney and paralegal time claimed by plaintiffs. After reviewing the objections of defendant Ada, plaintiffs adjusted certain hours, billed some hours at lower rates, and provided to the Court a detailed accounting and summary documenting how and why certain adjustments were made and others were not. **See,** *Hensley v. Eckerhart,* **supra.**

The Court has carefully reviewed the documentation of hours[6] supplied by plaintiffs in support of their request for attorney fees and finds that the 1,487.26 hours claimed by plaintiffs were reasonably and necessarily spent by plaintiffs in their prosecution of this lawsuit and that plaintiffs' attorneys exercised appropriate billing judgment, given the novelty and difficulty of the questions presented by Guam's

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[5] (...continued)

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|---|---|---|---|
| **ACLU Affiliate - Hawaii** | | | |
| Carl Varady | 16.00 | $150 | $ 2,400.00 |

[6] To the extent that any of plaintiffs' attorneys' time records were reconstructed, the Court still finds that the hours claimed are reasonable. **See,** *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983).

status as a territory, the extreme time limitations imposed by the circumstances, the particularized skill necessary to address the constitutional issues presented, and the experience of the attorneys involved.[7]

**Reasonableness of Hourly Rates Claimed through October 12, 1990**

Reasonable fees under § 1988 are calculated according to the prevailing market rate in the community in which the litigation takes place. *Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984); *D'Emanuela,* **supra,** at 1384. The "reasonable hourly rate" is determined by reference to the hourly amount which private counsel of similar experience, reputation and skills could command in cases of similar complexity in the community. *White v. City of Richmond,* 713 F.2d 458, 460 (9th Cir. 1983). Because the standard under § 1988 is prevailing market rate and not the customary billing rate, the Court may consider awarding a higher than usual hourly rate. **See,** Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir.), **cert. denied sub nom.,** *Webb v. Maldonado,* 484 U.S. 990 (1987).

**Hourly Rates of Local Counsel**

For local counsel (including Mr. Varady from the Hawaii office of the ACLU), plaintiffs seek hourly rates as follows: Joaquin C. Arriola, $200.00 per hour, Mark C. Cowan,

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[7] Defendant Ada requested at oral argument that plaintiffs' attorneys' hours be reduced ten percent across-the-board. No support was given for this figure, and such a reduction is not supported by the facts of this case.

$195.00 per hour, Anita P. Arriola, $175.00 per hour, and Carl Varady, $150.00 per hour. These hourly rates are apparently higher than these attorneys customarily charge.

Defendant Ada acknowledges that the appropriate hourly rate to be awarded is the prevailing market rate in the community for attorneys of similar experience and skill but argues that the rates sought by Arriola, Cowan & Bordallo are too high, given the fee agreement[8] between the law firm and plaintiffs (which provided for an hourly rate of "at least $120.00"), the prevailing hourly rate on Guam, the relative simplicity of the case,[9] and the experience, reputation, and skill of the four "local counsel" involved in this case. In particular, defendant Ada notes that at the beginning of this litigation, Joaquin C. Arriola billed his time at $150.00 per

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[8] A pre-existing fee agreement does not limit the amount of attorney fees allowed under § 1988; rather, it is one of the factors to be considered in assessing the reasonableness of the award of attorney fees and is neither dispositive nor does it set a ceiling on the award. See, *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). The court has considered the fee agreement itself, the circumstances under which it was entered, the understanding of the parties at the time, and, as shown above, the relationship between the hourly rate set forth in the agreement and the prevailing market rate on Guam. Even the fact that the attorneys may have agreed not to charge some or all of the plaintiffs anything for handling the case does not preclude an award of a reasonable attorney fee under § 1988. **Id.**

[9] In an Addendum to its contract with one of the Special Assistant Attorneys General hired to assist in this case, the government referred to the "novel substantive nature of the case" as one reason for substantially increasing the contract amount. See, Attachment to Declaration of Elizabeth Barrett-Anderson, filed February 11, 1991.

hour, Mark E. Cowan at $130.00 per hour, and Anita P. Arriola billed her time at $120.00 per hour.

Plaintiffs' local counsel augment their request for increased hourly rates with several affidavits from fellow members of the Guam bar. These affidavits show that the range of prevailing rates on Guam for lawyers of similar experience, skill, and reputation is from $150 to $225 per hour for partners and $100 to $150 per hour for associates. See, e.g., Declarations of J. Bradley Klemm, James S. Brooks, and G. Patrick Civille, filed November 15, 1990.

The Court has reviewed the several affidavits presented by plaintiffs and defendants to establish the prevailing market rate for Guam, and has determined that the hourly rates requested by Joaquin C. Arriola, Mark E. Cowan, Anita Arriola, and Carl Varady are reasonable when compared to the hourly rates of Guam attorneys of similar experience, skill, and reputation. Further, the Court has considered the experience, skill, and reputation of the four local counsel, as documented in their supporting papers. Messrs. Arriola and Cowan both possess high legal skills and years of experience in the Guam legal community. Each has a good reputation. Ms. Arriola, as will be discussed at greater length **infra**, possesses particular skill and experience in civil rights cases and was uniquely qualified on Guam to spearhead this effort as lead local counsel. Mr. Varady also appears to possess the skills and experience necessary to justify the hourly rate sought. Each attorney's skills contributed to the successful result, which was achieved in a compressed time frame. Each attorney still faces the prospect of no recovery of fees or costs.

For the foregoing reasons, and because the enquiry is the prevailing market rate, rather than the hourly rate normally charged, the Court will award local counsel the requested hourly rates of $200.00, $195.00, $175.00, and $150.00, respectively. Based on the hours spent by each of these attorneys, plaintiffs lodestar reasonable attorney fees are as follows: Joaquin C. Arriola - $2,040.00, Mark E. Cowan - $2,086.50, Anita P. Arriola - $135,161.25, and Carl Varady - $2,400.00.

**Hourly Rates of American Civil Liberties Union - Reproductive Freedom Project (ACLU-RFP)**

The "prevailing market rate" rule applies to attorneys working for non-profit and "public interest" organizations. See, *Blum v. Stenson,* 465 U.S. at 896. In determining the reasonableness of a fee request from an attorney who tried the case in a community different than that in which she or he normally practices, the court may consider 1) the fee customarily charged for similar services in the locality where the attorney normally practices, 2) whether services of like quality are truly available in the locality where they were rendered, and 3) whether the party acted reasonably in making the choice to bring in the attorney from a different community. *Chrapilwy v. UniRoyal, Inc.,* 670 F.2d 760, 769 (7th Cir. 1982), **cert. denied,** 461 U.S. 956 (1983); *Louisville Black Police Officers Organization, Inc. v. city of Louisville,* 700 F.2d 268, 278 (6th Cir. 1983).[10] The court may also consider

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[10] The Court has been unable to find a Ninth Circuit case adopting the same reasoning, perhaps because most areas of the Ninth Circuit have readier access to attorneys with specialized skills and experience in civil

(continued...)

whether an award of attorney fees based on the prevailing market rate in the community in which the litigation is conducted, if less than that in which the attorney normally practices, will prevent those in smaller or more remote communities from obtaining the experienced legal counsel they need. **See,** *Maceira v. Pagan,* 698 F.2d 38, 40 (1st Cir. 1983).

The rates requested for off-island counsel are $241.00 per hour for Lynn Paltrow and Rachel Pine, $135.00 per hour for Simon Heller and Louise Melling, $100.00 per hour for Ellen K. Goetz, $80.00 per hour for Andrew W. Dwyer, and $25.00 per hour for Simon Heller for work he performed which could have been performed by someone of less skill and experience.

The court has reviewed the documentation and affidavits provided by off-island counsel in support of their claimed hourly rates and finds that the hourly rates they seek are reasonable and justified. The time and labor spent by these attorneys was reasonable, and essentially unchallenged by defendants. The fact that Guam is a United States territory presented a novel aspect to the case. They possess, abundantly, the skills requisite to perform the legal service properly. the geographical distance and time differences between New York and Guam, combined with the rapidity with which the litigation unfolded, imposed additional burdens. The results obtained were exactly what they sought,

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[10] (...continued)
rights litigation than does Guam.

but they still face the possibility of recovering neither their fees nor their costs. the Court further finds that the attorneys of the ACLU-RFP have unique experience and skill in these cases, and can marshal resources not available on Guam.

It was not only reasonable, but prudent, for plaintiffs to enlist the services of the ACLU-RFP attorneys to assist in this lawsuit. Therefore, the Court accepts as reasonable the hourly rates sought by plaintiffs for off-island counsel and specifically finds that by awarding these attorneys the prevailing market rate in the legal community in which they are based, other, similarly skilled attorneys will be induced to take their skills where they are needed but not readily available. *Maceira,* **supra.** The lodestar, reasonable attorney fees based on those rates are as follows: Lynn Paltrow - $43,155.87, Rachel Pine - $4,217.50, Simon Heller (attorney hours) - $51,170.40, Louise Melling - $5,197.50, Ellen K. Goetz - $1,340.00, Andrew W. Dwyer - $3,200.00, and Simon Heller (non-attorney hours) - $262.50.

**Reasonableness of Costs Claimed through October 12, 1990**

For this first time period, and again after adjustments made in light of objections made by defendant Ada, the law firm of Arriola, Cowan & Bordallo claims costs of $10,871.80 and the ACLU-RFP claims expenses of $19,578.67.

The Court has carefully reviewed the costs as documented and claimed by plaintiffs' attorneys and finds that they are reasonable and were necessarily incurred in the course of this litigation. Further, defendant Ada makes no objection to the revised costs as submitted.

Therefore, costs are awarded, through October 12, 1990, to the law firm of Arriola, Cowan & Bordallo in the amount of $10,871.80 and to the ACLU-RFP in the amount of $19,578.67.

**Summary of Attorney Fees and Costs Through October 12, 1990**

Based on the foregoing analysis using the *Kerr* factors, local counsel Arriola, Cowan & Bordallo have been awarded lodestar attorney fees in the amount of $139,287.75 and costs of $10,871.80; Carl Varady has been awarded lodestar attorney fees in the amount of $2,400.00, and the ACLU-RFP has been awarded lodestar attorney fees in the amount of $108,543.77 and costs of $19,578.67.

**Post-Judgment Hours Spent and Expenses Incurred Seeking Fees and Costs**

Plaintiffs also seek an award of fees and costs for time spent and expenses incurred in preparing for and arguing this motion for reasonable attorney fees and costs. The Court agrees that plaintiffs are entitled to recover attorney fees and costs for services rendered in seeking and establishing an attorney fees award. **See,** *Knighton v. Walkins,* 616 F.2d 795, **reh. denied,** 620 F.2d 300 (5th Cir. 1980); *Souza v. Southworth,* 564 F.2d 609, 613-14 (1st Cir. 1977).

The Court has reviewed the hours claimed and the costs incurred through March 11, 1991, and finds, using the *Johnson/Kerr* analysis employed hereinabove, that they are reasonable and were necessarily incurred in seeking this award of attorney fees and costs. Therefore, the Court awards reasonable attorney fees and costs as follows: Anita

P. Arriola - 71.3 hours @ $175/hour = $12,477.50; Mark E. Cowan - 2.2 hours @ $195/hour = $429.00; Simon Heller - 62.62 hours @ $135/hour = $8,453.70. The law firm of Arriola, Cowan & Bordallo is awarded reasonable costs of $590.67 and the ACLU-RFP is awarded reasonable costs of $846.95. Also, the Court notes that Ms. Arriola has performed work, appeared at status conferences, met and/or otherwise conferred with opposing counsel in an attempt to stipulate to attorney fees and costs, and appeared and argued this motion. The Court believes that Ms. Arriola spent at least five hours since March 11, 1991, and therefore awards her additional attorney fees of $875.00.

**The Multiplier**

Plaintiffs seek to have their attorney fees award doubled. They base this request on the fact that they accepted the case as a contingent case, that it was an "undesirable" case in the community, and plaintiffs' difficulty in obtaining qualified counsel.

The product of reasonable hours times a reasonable hourly rate normally produces the reasonable attorney's fee. *Hensley v. Eckerhart*, 461 U.S. at 434. However, this

> ...does not end the enquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."

**Id.**

"There is a 'strong presumption' that the lodestar figure computed by the method outlined above represents a

'reasonable' attorney's fee. (citations omitted) Nevertheless, in certain 'rare, exceptional cases' the lodestar figure may be adjusted upward or downward in consideration of the *Kerr* factors not subsumed. (citation omitted)." *D'Emanuela*, 904 F.2d at 1384.

The Court has found scant guidance in the caselaw for explicit facts which have been found to justify a particular multiplier. For example, in the opinion of a very divided court, Justice O'Connor stated that a multiplier is justified if the fee applicant can establish that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market'" *Pennsylvania v. Delaware Valley Citizens' for Clean Air*, 483 U.S. 711, 733, 107 S.Ct. 3078, 3091 (1987) (*Delaware II*). Also, any enhancement for contingency must reflect "the difference in market treatment of contingent fee cases **as a class**, rather than... the 'riskiness' of a particular case'." **Id.** at 731 (emphasis in original).[11]

The burden of proving that an upward adjustment is necessary to establish a reasonable attorney fee is on the applicant. *Blum v. Stenson*, 465 U.S. at 898.

As noted above, when assessing the merit of a claimed multiplier, the district court uses those *Johnson/Kerr* factors which were not subsumed in the determination of the reasonable attorney fee award. *Cunningham*, 879 F.2d at 484.

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[11] In the Ninth Circuit, *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1986), utilized the two factors identified in *Delaware II* in determining whether a multiplier was appropriate.

Initially, the Court determines that there is no justification to award an enhanced attorney fee to the ACLU-RFP. The Reproductive Freedom Project exists to participate in this type of case and needs no inducement, such as the prospect of an enhanced fee upon a successful conclusion to the case, to become involved. Further, the ACLU-RFP attorneys have had their fees awarded based on the prevailing market rate in New York and they were not subject to the same community-based pressures as local counsel. The court has considered those factors not subsumed in the "reasonable attorney fee award" analysis above and concludes that they do not justify application of a multiplier to the ACLU-RFP attorney fee award.[12] The court next considers a multiplier for work performed by local counsel.[13]

Plaintiffs presented affidavits from local attorneys that indicate that contingent fee cases are not accepted on Guam unless the attorney or firm calculates that a successful lawsuit will recover an amount two to three times greater than would be billed a paying client for the same case. **See, generally,** the Declarations of J. Bradley Klemm, James S. Brooks, and G. Patrick Civille, filed November 15, 1990. Mr. Klemm, in particular, averred that he could not remember in his 17

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[12] The Court is aware of the general admonition to treat private and public interest counsel equally, **Blum**, 465 U.S. at 902, n.18., but believes different treatment is warranted here, as explained **infra.**

[13] The Court does not consider, in this context, the work of Carl Varady of the Hawaii office of the ACLU to have been performed by "local counsel," for reasons which will be made apparent in the analysis.

years of practice on Guam even one class action civil rights case of this magnitude. **Id.** at 3. He further stated that "such lawsuits are unappealing to firms on Guam due to their complexity, their usually controversial and undesirable nature, and the lack of a history of such litigation on the island." **Id.** He also expressed his belief that "lawyers and law firms on Guam are reluctant to take plaintiff class action civil rights cases because they take too many years to resolve, are too expensive to litigate, and tie up a firm's resources for long periods of time. **Id.** at 4.

Plaintiffs' counsel stated that the prospect of an upward adjustment of fees due to the risk inherent in contingent fee cases was a critical inducement in their decision to accept the case. **See,** Declarations of Anita P. Arriola and Simon Heller, filed November 15, 1990.

From all the affidavits submitted, it is clear that without the prospect of an upward adjustment for their attorneys, plaintiffs would have faced "substantial difficulties" in securing local counsel.[14] *Delaware II*, **supra.**

Plaintiffs also cite the undesirability of this case in support of their request for a multiplier. "Undesirability" has been accepted as an adjustment factor by the Ninth Circuit. **See,** *Clark v. City of Los Angeles,* 803 F.2d 987, 991 (9th Cir. 1986) (one factor justifying 1.5 multiplier); *Fadhl v. City and*

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[14] Plaintiffs need only demonstrate that they would have encountered substantial difficulty in finding counsel at the time they commenced their lawsuit, not that they actually did face such difficulty. *McKenzie v. Kennickell,* 875 F.2d 330 (C.A.D.C. 1989), **reh. denied,** 884 F.2d 1405.

*County of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1986) (one factor justifying 2.0 multiplier).

The record reflects that plaintiffs' local attorneys accepted this case in the face of a unanimous Legislature, as well as a Governor who had taken a strong personal and political stand on the issue, despite both having been advised by the Attorney General that the law was unconstitutional. The Roman Catholic Church had also spoken publicly, even threatening excommunication of opponents of the law. Ms. Arriola's affidavit states that she received death threats, and encountered overt hostility from members of the community. The Court notes, and the record supports, that Guam is a relatively small and predominantly Catholic community and that this lawsuit was particularly emotionally-charged. Declarations of other local attorneys also indicate the plaintiffs would have had much difficulty finding local counsel, due to the high visibility of the case, the small size of the island, and the many conflicts of interest occasioned by the many parties involved. There is no doubt in my mind that this case was deemed extremely undesirable in the community and that local counsel faced unusual and trying personal and professional pressures during the pendency of this lawsuit.[15]

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[15] It is interesting to note that this issue literally found families on opposite sides: Senator Elizabeth Arriola, sponsor of P.L. 20-134, is the mother of local lead counsel Anita P. Arriola. Although this fact plays no part in the Court's decision, it serves to illustrate not only the relatively small size of the community but also the often personal toll the issue might exact from the participants.

To the best of the Court's knowledge, and as acknowledged by several local attorneys, and as revealed by her **curriculum vitae**, there is no other attorney on Guam who possesses Ms. Arriola's combination of skill and experience in handling class action civil rights lawsuits of this size and complexity. Ms. Arriola's extensive experience made her particularly qualified to serve as lead local counsel and her professional and personal demeanor (as well as that of all the attorneys involved, on both sides of the issue) during this lawsuit brought honor to herself and the legal community as a whole.

The Court is further persuaded that Ms. Arriola undoubtedly was precluded from other employment when she accepted this case. As documented above, she spent many, many hours seeing it through to its conclusion.

Because of the contingent nature of the case, the undesirability of the case, and the extreme reluctance or conflicts of interest which prevented other local attorneys from representing plaintiffs, the court believes that local counsel deserve a multiplier, that the particular facts and circumstances of this case rendered it a "rare and exceptional" case justifying a multiplier, and that an appropriate multiplier is 2.0. This multiplier will be applied only for hours expended by local counsel up to and including October 12, 1990. **See, e.g.,** *Equal Opportunity Employment Commission v. Sage Realty Corporation,* 521 F.Supp. 263 (D.C.N.Y. 1981) (no multiplier should be assigned to that part of the lodestar figure which is based on attorney fee application activities, because there was no longer a risk of loss). The court believes this multiplier reflects the

difference in Guam's market treatment of contingent fee cases as a class, rather than the "riskiness" of this particular case. *Delaware II*, **supra.**

**Conclusion**

The court awards reasonable attorney fees and costs to the ACLU-RFP in the amount of $108,543.77 and $19,578.67, respectively, for the time period through October 12, 1990.

The Court awards reasonable attorney fees to Carl Varady of the Hawaii office of the ACLU in the amount of $2,400.00, with no multiplier.[16]

The Court awards reasonable attorney fees for work performed up to and including October 12, 1990, after calculation using the multiplier, to local counsel Joaquin C. Arriola, Mark E. Cowan, and Anita P. Arriola in the amount of $278,575.50 (2 x $139,287.75 lodestar attorney fees for work performed through October 12, 1990).

The Court awards reasonable attorney fees to Arriola, Cowan & Bordallo for work performed after October 12, 1990, to date in the amount of $13,781.50.

The court awards reasonable attorney fees to the ACLU-RFP for work performed by Simon Heller after October 12, 1990, in the amount of $8,453.70.

The firm of Arriola, Cowan & Bordallo is awarded reasonable costs in the amount of $10,871.80 for expenses

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[16] See n. 13, p. 17, **supra.**

incurred through October 12, 1990, and $590.67 for costs incurred after that date.

The ACLU-RFP is awarded costs in the amount of $846.95 for expenses incurred after October 12, 1990.

IT IS SO ORDERED.

DATED this **25th** day of June, 1991.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

Not for Publication

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| Guam Society of Obstetricians and Gynecologists, et al., *Plaintiffs-Appellees/ Cross-Appellants,* | ] | Nos. 91-16910 92-15064 |
| v. | ] | D.C. No. CV90-00013-ARM |
| **Joseph F. Ada,** in his individual and official capacities, et al., *Defendants-Appellants/ Cross-Appellees* | ] | MEMORANDUM* |

Appeal from the United States District Court
for the District of Guam
Alex R. Munson, District Judge, Presiding

Argued and Submitted July 14, 1993
San Francisco, California
Filed September 1, 1993

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

Before: HUG and LEAVY, Circuit Judges, and REAL** Chief District Judge.

Defendant-appellant Joseph F. Ada, Governor of Guam and other territorial officials (collectively "*Guam*") challenge the district court's award of attorney's fees and costs under 42 U.S.C. § 1988 to plaintiff-appellee Guam Society of Obstetricians and Gynecologists, and other plaintiffs (collectively "*Plaintiffs*"). The plaintiffs prevailed in a class action lawsuit that successfully challenged the constitutionality of a Guam statute restricting women's access to abortion procedures. *Guam Society of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S.Ct. 633 (1992).

Guam contends that the district court improperly considered the risk of nonpayment in calculating the lodestar of all counsel and in applying a multiplier to the lodestar of lead local counsel, Arriola, Cowan & Bordallo ("AC&B"). Guam also contends that the district court improperly awarded fees to the American Civil Liberties Union Reproductive Freedom Project ("ACLU-RFP") for work performed on behalf of the plaintiffs on the basis that the ACLU-RFP did not have standing to sue. The plaintiffs cross-appeal, contending that the district court improperly failed to apply a multiplier to the lodestar of ACLU-RFP.

The district court had jurisdiction under 42 U.S.C. § 1988. We have jurisdiction under 28 U.S.C. § 1291. We vacate and remand all of the attorney's fees awards.

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** The Honorable Manuel L. Real, Chief United States District Judge for the Central District of California, sitting by designation.

I.

Guam argues that under the Supreme Court's holding in *Burlington v. Dague*, 112 S.Ct. 2638 (1992), the district court erred by considering the risk that counsel would not be paid for their services when it set the hourly rates upon which it calculated the lodestar figure of all counsel and when it applied a multiplier to the lodestar of AC&B. We agree.

In *Burlington*, the Supreme Court held that under certain environmental action fee shifting statutes a court may not "enhance the fee above the 'lodestar' amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assume the risk of receiving no payment at all for their services." 112 S.Ct. at 2639, 2641-43. We have since held that the *Burlington* holding also applies to attorney's fee awards under 42 U.S.C. § 1988, **see** *Gates v. Deukmejian*, 987 F.2d 1392, 1403 (9th Cir. 1992), and to the calculation of the lodestar itself. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992) **vacated in part on other grounds,** 984 F.2d 345 (9th Cir. 1993). Neither *Burlington* nor its progeny had been decided at the time the district court entered the fee award, and thus the district court had no opportunity to apply those holdings. We remand the case for the district court to reconsider its fee awards in light of those opinions.

II.

Guam argues that the district court erred by awarding attorney's fees to ACLU-RFP for the trial work it performed on behalf of plaintiffs Laurie Konwith and Guam Nurses Association, who, it maintains, did not have standing to sue.

In the merits appeal, Guam challenged the standing of these plaintiffs and the effect of their standing on an attorney's fee award for legal work performed on appeal. Guam now raises the same objection to the fee award for trial work. The ACLU-RFP contends that this issue was waived and also contends it is entitled to fees for work for other plaintiffs who clearly had standing. These issues can be considered on remand.

**VACATED** and **REMANDED.**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| Guam Society of Obstetricians and Gynecologists; Guam Nurses Association; Milton Cole; Laurie Edmund A. Griley, M.D.; Williams S. Freeman, M.D.; John Dunlop, M.D.; Maria Doe, on behalf of herself and all others similarly situated, et al., *Plaintiffs-Appellees/ Cross-Appellants,* | Nos.91-16910 92-15064 |
| v. | D.C. No. CV90-00013-ARM |
| **Joseph F. Ada,** in his individual and official capacities et al., *Defendants-Appellants/ Cross-Appellees.* | |

**APPEAL** from the United States District Court for the District of Guam.

**THIS CAUSE** came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the [sic] District of Guam and was duly submitted

**ON CONSIDERATION WHEREOF**, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this cause be, and hereby is **VACATED** and **REMANDED.**

Filed and entered September 01, 1993.

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**IN THE UNITED STATES DISTRICT COURT**
**TERRITORY OF GUAM**

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| Guam Society of Obstetricians and Gynecologists; Guam Nurses Association; The Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; John Dunlop, M.D., on behalf of themselves and all others similarly situated, and all other women patients,<br>*Plaintiffs*,<br><br>v.<br><br>Joseph F. Ada, in his individual and official capacities; **Dr. Leticia Espaldon, George B. Palican; Elizabeth Barrett-**Anderson; Gloria B. Nelson, **Thomas J.B. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero, and Michael Phillips,** as the Board of Directors of **Guam Elections Commission**, in their official capacities, together with all others similarly situated.<br>*Defendants* | Civil Case No. 90-00013<br><br>DECISION AND ORDER AFTER REMAND RE AWARD OF ATTORNEY FEES AND COSTS |

THIS MATTER came before the Court on December 7, 1993, for reconsideration after remand of the previous award

of attorney fees and costs in light of subsequent decisions of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. Plaintiffs appeared by and through their attorney, Anita P. Arriola of Arriola, Cowan & Bordallo; all defendants appeared by and through attorney Katherine A. Maraman.

By decision and order dated August 23, 1990, this Court granted summary judgment in favor of plaintiffs. The decision found Guam's newly-enacted abortion law[1] unconstitutional under the United States Constitution, Guam's Organic Act, and 42 U.S.C. § 1983. Defendants Governor Joseph F. Ada, Attorney General Elizabeth Barrett-Anderson, Dr. Leticia Espaldon, and their respective employees, agents, and successors were permanently enjoined in their official capacities, under the Constitution, the Organic Act, and 42 U.S.C. § 1983, from enforcing and/or executing any provision of the law.

Plaintiffs thereafter sought and were awarded reasonable attorney fees and costs as the prevailing parties pursuant to 42 U.S.C. § 1988. Defendants appealed. By order dated September 1, 1993, the United States Court of Appeals for the Ninth Circuit vacated the award of fees and remanded for reconsideration of the award in light of the United States Supreme Court's decision in *Burlington v. Dague*, 112 S.Ct. 2638 (1993), and later Ninth Circuit decisions, all or which were decided after the original June 25, 1991, award of attorney fees herein. The Ninth Circuit also directed this

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[1] Public Law 20-134, which has been signed into law by Governor Joseph F. Ada on March 19, 1990.

court to make a determination whether or not plaintiffs Konwith and Guam Nurses Association (GNA) had standing, and the effect, if any, of the decision regarding standing on the fees awarded to the American Civil Liberties Union-Reproductive Freedom Project (ACLU-RFP).[2]

**Standing of GNA and Konwith**

Defendants maintain that plaintiffs Guam Nurses Association and Laurie Konwith lacked standing and, consequently, that the ACLU-RFP was not entitled to attorney fees for work undertaken on their behalf.[3] The court rejects this argument for the following reasons.

When considering challenges to a party's standing, the court accepts as true all material allegations of the complaint, and construes them in favor of plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

An organization can sue on its own behalf and on behalf of its members when the members would have standing to sue in their own right, the interests the organization seeks to protect are germane to its purpose, and neither the claim nor the relief requested require the participation of individual

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[2] Plaintiffs have asked the court to also reconsider its earlier decision not to use a multiplier for fees awarded to the ACLU-RFP. Generally, a court is limited on remand to consideration of only those issues specified in the remand order. In any event, the court would not alter its original decision on the ACLU-RFP award, for the same reasons given in its original order.

[3] The Ninth Circuit indicated Guam would have the opportunity to argue standing in this court. Guam Society of Obstetricians & Gynecologists v. Ada, F.2d 1366, 1374 n.11 (9th Cir. 1992).

members. *See, e.g., Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). The GNA had standing under this test. The GNA is a non-profit organization of 90 nurses who are registered on Guam and who provide medical care and treatment, including abortion counselling and referral information to pregnant women. Every member of GNA was subject to criminal prosecution under the law, both for providing counselling and for participating in abortions.

For a taxpayer to have standing in a state (which is most analogous to Guam's status), the taxpayer must show that he or she "has sustained or is immediately in danger of sustaining some direct injury as a result of the [challenged statute's] enforcement." *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1975). The direct injury required by *Doremus* is established when the challenged statute involves the expenditure of state tax revenues. *Hoohuli v. Ariyoshi*, 932 F.2d 765, 769 (9th Cir. 1991). Plaintiff Konwith had standing as a taxpayer for two reasons. First, because the law required the expenditure of public funds for the referendum contemplated under the Act and for administering the "peer review committee" established in Section 2 of the Act. Second, because Guam's statutory Bill of Rights, 48 U.S.C. § 1421b(p), prohibits the direct or indirect use of public monies "for the use, benefit, or support of any... system or religion[.]" This law precisely embodied the Catholic Church's doctrine regarding abortion.

Accordingly, the court finds that plaintiffs GNA and Konwith had standing in their own right, and that the ACLU-

RFP is entitled to attorney fees and costs for all work performed on their behalf.[4]

**Attorney Fees**

The court has been directed to again consider[5] its award of attorney fees (the multiplier of two) in light of the Supreme Court's conclusion in *Burlington v. Dague* that it is not appropriate to use a multiplier to increase fees to compensate attorneys for the risk inherent in contigent fee cases. Appellants also ask the court to reduce its previously awarded increase of appellees' rates from their contract rate of $120 per hour to the prevailing market rate in Guam. The Court declines to reduce the rate.[6]

In the original award of attorney fees, the court concluded that a multiplier of two was justified for three reasons: the risk inherent in contigent fee cases, the undesirability of the case and the concomitant problem of

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[4] The ACLU-RFP apparently rendered services on behalf of all plaintiffs, not just GNA and Konwith. The court questions whether, in any event, the work done on behalf of the various plaintiffs by the ACLU-RFP could be effectively divided for purposes of calculating attorney fees and costs.

[5] The court's duty is to reconsider its award of attorney fees in light of *Burlington v. Dague* and subsequent Ninth Circuit decisions, but to exercise independent judgment in doing so. *ICC v. Transcon Lines*, No. 92-55036, slip op. at 12022 n.2 (9th Cir. Oct. 26, 1993).

[6] This aspect of the fee award was discussed at page 7 of the June 25, 1991, decision and order regarding attorney fees. Reasonable hourly rates are determined by reference to prevailing market rates in the community in which the litigation takes place. *See, Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

finding qualified attorneys willing to undertake the representation, and the rare and exceptional nature of the case.

After due consideration, the court declines to lessen the multiplier of two or otherwise alter its original award.[7] While the risk of the contigent fee did factor into the court's first decision, the more important considerations, as reflected in the decision, were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam. As set out in the previous decision, lead counsel Anita Arriola received death threats and was subject to personal vilification on the streets of Guam. The court was at that time fully convinced of the serious nature of the threats, and its concern has not been lessened by subsequent events in other jurisdictions in which the abortion debate rages. Accepting this case not only required a high degree of professional courage, but of physical courage, as well. The court is persuaded that, even with the prospect of a multiplier of two, Guam attorneys asked to represent similarly unpopular plaintiffs in similarly unpopular cases will be extremely reluctant to undertake representation.

The values given to the factors considered in arriving at the multiplier in the court's original decision were necessarily subjective. The decision to award a multiplier of

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[7] To the extent not expressly changed by this decision and order, the court adopts and fully incorporates herein its June 25, 1991, order awarding attorney fees and costs to plaintiffs.

two was arrived at after the court assessed the overt and pervasive hostility faced by plaintiffs' counsel from many members of the community, the resultant high visibility and extreme unpopularity of the case, and the novel legal aspects it presented as the most restrictive anti-abortion law enacted under the U.S. flag. For persons not directly involved, the passion which this case excited on Guam cannot be adequately appreciated or understood. Even removing the element of contigent fee risk, the court remains strongly persuaded that the multiplier of two is justified and warranted.

**Conclusion**

Having fully reconsidered the issue after remand, the court awards the following attorney fees and costs. Unless otherwise directed, all fees and costs are to be paid within thirty (30) days:

1) To local counsel Joaquin C. Arriola, Mark E. Cowan, and Anita P. Arriola, the Court awards reasonable attorney fees as follows: a) for work performed up to and including October 12, 1990, after calculation using the multiplier, in the amount of $278,575.50 (2 x $139,287.75 lodestar attorney fees for work performed through October 12, 1990), b) for work performed after October 12, 1990, to date of remand in the amount of $13,781.50, and c) for work performed after remand up to and including oral argument, the sum of $7,525.00, said figure representing 40.95 hours of Ms. Arriola's work at $175.00 per hour, plus an additional court-estimated 2.05 hours for work up to and including oral argument at the hearing.

2) The Court awards reasonable attorney fees to Carl Varady of the Hawaii office of the ACLU in the amount of $2,400.00, with no multiplier.

3) The Court awards reasonable attorney fees to the ACLU-RFP in the amount of $108,543.77 for the time period through October 12, 1990, with no multiplier.

4) The Court awards reasonable attorney fees to the ACLU-RFP for work performed by Simon Heller after October 12, 1990, in the amount of $8,453.70, with no multiplier.

5) The firm of Arriola, Cowan & Bordallo is awarded reasonable costs in the amount of $10,871,80 for expensed incurred up to and including October 12, 1990, $590.67 for the period from October 12, 1993, to the date of remand, and $90.80 for costs incurred after remand.

6) The Court awards reasonable costs to the ACLU-RFP in the amount of $19,578.67 for the time period up to and including October 12, 1990, and $846.95 for costs incurred after October 12, 1990, to date.

7) The Court awards interim attorney fees and costs to Arriola, Cowan & Bordallo in the amount of $95,190.00[8] and

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[8] Said amount being the product of 793.25 ACB hours times the contract rate of $120 per hour. This figure represents those ACB hours which were not challenged by defendants in any fashion, multiplied by the contract rate, to which defendants argued plaintiffs should be limited. This award of interim fees should not be construed as an agreement by the court with defendants' argument that the contract rate controls. Rather, it is made in recognition of the extreme financial hardship visited upon a small firm faced with years of uncompensated effort and because

$10,871.80[9], respectively. These fees and costs shall be paid within five (5) days of the date of this order, and shall be set off against the total award of fees and costs, above.

8) Interest on all attorney fees and costs awarded shall be calculated pursuant to 28 U.S.C. § 1961 and shall run from the date of entry of judgment, November 12, 1991, until paid.[10]

IT IS SO ORDERED.

Dated this 10th day of December, 1993.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

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defendants did not oppose this amount.

[9] This figure represents ACB costs incurred up to October 12, 1990, which were unchallenged by defendants.

[10] Defendants' reliance on *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570 (1990), is not well-taken. *Kaiser* involved a jury verdict for damages, not attorney fees. The Supreme Court found the decision underlying the damages was not supported by the evidence. No such claim is made here.

Defendants' claim that Federal Rule of Appellate Procedure 37 precludes an award of interest is likewise not well-taken. By its terms, Rule 37 applies only to judgments which have been modified or reversed. The remand order from the Ninth Circuit neither modified nor reversed the earlier decision.

**IN THE UNITED STATES DISTRICT COURT**
**TERRITORY OF GUAM**

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| Guam Society of Obstetricians and Gynecologists; Guam Nurses Association; the Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; John Dunlop, M.D., on behalf of themselves and all others similarly situated, and all their women patients,<br>*Plaintiffs,*<br>v.<br>Joseph F. Ada, in his individual and official capacities; Dr. Leticia Espaldon; George B. Palican; Elizabeth Barrett-Anderson; Gloria B. Nelson, Thomas J.B. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael Phillips, as the Board of Directors of the Guam Election Commission, in their official capacities, together with all others similarly situated,<br>*Defendants* | Civil Case No. 90-00013<br><br>JUDGMENT |

THIS MATTER came before the Court on December 7, 1993, on remand from the United States Court of Appeals for the Ninth Circuit. The issues having been fully briefed and

argued by the parties, and the Court having fully considered the issues after remand, NOW, THEREFORE,

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Both plaintiffs Guam Nurses Association and Laurie Konwith had standing in their own right to maintain this lawsuit. The ACLU Reproductive Freedom Project (ACLU-RFP) is entitled to attorney fees and costs for all work performed on their behalf.

2. Plaintiffs are awarded attorney fees and costs pursuant to 42 U.S.C. § 1988 as follows which, unless otherwise directed, are to be paid within thirty (30) days from the date of the Decision and Order after Remand:

1) To local counsel Joaquin C. Arriola, Mark E. Cowan, and Anita P. Arriola, the Court awards reasonable attorney fees as follows:

a) for work performed up to and including October 12, 1990, after calculation using the multiplier, in the amount of $278,575.50 (2 x $139,287.75 lodestar attorney fees for work performed through October 12, 1990),

b) for work performed after October 12, 1990, to date of remand in the amount of $13,781.50, and

c) for work performed after remand up to and including oral argument, the sum of $7,525.00.

2) The Court awards reasonable attorney fees to Carl Varady of the Hawaii office of the ACLU in the amount of $2,400.00, with no multiplier.

3) The Court awards reasonable attorney fees to the ACLU-RFP in the amount of $108,543.77 for the time period through October 12, 1990, with no multiplier.

4) The Court awards reasonable attorney fees to the ACLU-RFP for work performed by Simon Heller after October 12, 1990, in the amount of $8,453.70, with no multiplier.

5) The firm of Arriola, Cowan & Bordallo is awarded reasonable costs in the amount of $10,871.80 for expenses incurred up to and including October 12, 1990, $590.67 for the period from October 12, 1993, to the date of remand, and $90.80 for costs incurred after remand.

6) The court awards reasonable costs to the ACLU-RFP in the amount of $19,578.67 for the time period up to and including October 12, 1990, and $846.95 for costs incurred after October 12, 1990, to date.

7) The court awards interim attorney fees and costs to Arriola, Cowan & Bordallo in the amount of $95,190.00 and $10,871.80, respectively. These figures represent fees and costs which were not challenged by defendants. These fees and costs shall be paid within five (5) days of the date of the decision and order after remand, dated December 10, 1993, and shall be set off against the total award of fees and costs, above.

8) Interest on all attorney fees and costs awarded shall be calculated pursuant to 28 U.S.C. § 1961 and shall run from the date of entry of judgment, November 12, 1991, until paid.

IT IS SO ORDERED.

## APPENDIX D-3

DATED this 28th day of December, 1993.

/s/ Alex R. Munson
ALEX R. MUNSON
JUDGE

**APPENDIX D-4**

100 F.3d 691

**GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS, Guam Nurses Association; The Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; William S. Freeman, M.D.; and John Dunlop, M.D.;** on behalf of themselves and all others similarly situated, and all their women patients,
*Plaintiffs-Appellees,*

v.

**Joseph F. ADA,** in his personal and official capacities, et al., *Defendants-Appellants.*

No. 94-15070.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 1, 1995.
Decided Nov. 7, 1996.

Plaintiffs who successfully challenged constitutionality of Guam's antiabortion statute sought to recover attorney fees under § 1988. After original award was vacated and case remanded for consideration of intervening case law, 5 F.3d 536, the United States District Court for the District of Guam, Alex Munson, Chief Judge, reinstated full amount of original award and also awarded plaintiffs interest from the date of the original fee award as well as interim fees. Defendants appealed. The Court of Appeals, Michael Daly Hawkins, Circuit Judge, held that: (1) district court was justified in employing hourly rate of $175 for local counsel; (2) on remand, district court was justified in again applying same 2.0 multiplier to lodestar figure; (3) unavailability of willing local counsel was proper factor justifying

enhancement of lodestar; (4) district court was justified in basing its calculation on approximately 1,500 hours of work; (5) nonprofit organization representing registered nurses had standing to challenge constitutionality of statute; (6) district court was justified in accepting rates for private New York attorneys as rates for plaintiffs' nonlocal counsel; (7) plaintiffs were entitled to interest on fees from date of entry of original award; (8) district court should not have awarded interest on award from date of entry of original award with regard to fees that were awarded for first time on remand; (9) district court was justified in awarding plaintiffs interim fees on remand; and (10) defendants would not be sanctioned for pursuing waived claim on instant appeal.

Affirmed in part, reversed and remanded in part.

**Kozinski**, Circuit Judge, dissented in part and filed opinion.

*694 Maria Fitzpatrick, Agana, Guam (argued); Arnold H. Leibowitz, Special Assistant Attorney General for Guam, Washington, DC, for defendant-appellant.

Simon Heller, The Center for Reproductive Law & Policy, New York City (argued); Anita Arriola, Arriola, Cowan & Bordallo, Agana, Guam (argued), for plaintiffs-appellees.

Appeal from the United States District Court for the District of Guam, Alex R. Munson, Chief Judge, Presiding. D.C. No. CV-90-00013-ARM.

Before: PREGERSON, KOZINSKI and HAWKINS, Circuit Judges.

**MICHAEL DALY HAWKINS**, Circuit Judge:

Defendants-appellants Joseph Ada, Governor of Guam, and other territorial officials appeal the district court's award of attorneys' fees under 42 U.S.C. § 1988 to plaintiffs-appellees

Guam Society of Obstetricians & Gynecologists, Guam Nurses Association ("GNA"), Dr. Edmund A. Griley, Dr. William S. Freeman, Dr. John Dunlop, Reverend Milton H. Cole, Jr. and Laurie Konwith. The fee award arises out of plaintiffs' successful constitutional challenge to Guam's anti-abortion statute. We previously vacated the initial award of attorneys' fees and remanded for the district court to consider intervening case law. On remand, the district court reinstated the full amount of the original award and also awarded plaintiffs interest from the date of the initial fee award as well as interim fees. This appeal concerns the district court's decision on remand.

## I. BACKGROUND

A. Underlying Litigation

In March of 1990, plaintiffs brought an action challenging the constitutionality of Guam Public Law 20-134, which outlawed virtually all abortions on Guam. The district court declared the law unconstitutional and granted plaintiffs' request for a permanent injunction against its enforcement. We affirmed. See *Guam Soc'y of Obstetricians and Gynecologists v. Ada,* 776 F.Supp. 1422 (D.Guam 1990), aff'd 962 F.2d 1366 (9th Cir.), cert. denied, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) ("GSOB/GYN").

**B. Initial Attorneys' Fees Award**

On June 25, 1991, the district court awarded plaintiffs attorneys' fees and costs under § 1988 in the total amount of $ 443,642.56. Most of the plaintiffs were represented locally by the law firm of Arriola, Cowan & Bordallo ("AC & B"). GNA and Laurie Konwith were represented by the American Civil Liberties Union's Reproductive Freedom Project ("ACLU-RFP"), which is based in New York. An attorney from the Guam office of the ACLU also worked on the case.

### 1. Local Counsel

The district court awarded fees for local counsel based upon hourly rates between $150.00 and $200.00 per hour.[1] The district court determined that these rates reflected the "prevailing market rates" for lawyers of similar skill and experience. In setting the hourly rate, the district court also found that:

> each attorney's skills contributed to the successful result, which was achieved in a compressed time frame. Each attorney *695 still faces the prospect of no recovery of fees or costs.

The district court then calculated the lodestar by multiplying these hourly rates by the number of hours reasonably spent on the litigation.

The district court also concluded that this was a "rare and exceptional case" which warranted a multiplier of 2.0 to the lodestar figure for AC & B. The district court relied in part on the contingent nature of local counsel's representation. However, the district court also found that plaintiffs would have faced substantial difficulty in securing other counsel to represent them and that this was an "undesirable" case given its visibility and controversial nature in Guam's small and predominantly Catholic community.

### 2. Off-Island Counsel/ACLU-RFP

The district court determined that the prevailing market rates for ACLU- RFP counsel were between $25.00 and

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[1] Specifically, the hourly rates applied by the district court for the AC & B attorneys were as follows: Joaquin Arriola--$200.00; Mark Cowan--$195.00; Anita Arriola--$175.00. The hourly rate applied for the local ACLU lawyer, Carl Varady, was $150.00.

$241.00 per hour.[2] These rates were supported by affidavits from other New York attorneys. The district court also mentioned the following factors in justifying the rates: (1) the attorneys' skill and experience; (2) the novel legal issues the case presented; (3) the distance between New York (where the ACLU-RFP attorneys practice) and Guam; (4) the short time frame in which the case was litigated; (5) the results obtained; (6) the lack of legal resources available on Guam; and (7) the possibility that no fees or costs would be recovered. It declined to apply any lodestar multiplier to the ACLU-RFP award.

### C. Appeal From Attorneys' Fees Award

In December of 1991, defendants appealed the fee award. Defendants argued that the district court erred in considering contingency risk in calculating the lodestar figure and in applying a multiplier. This argument was based upon several post-award decisions. See *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir.1992); *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir.1992), vacated in part on other grounds, 984 F.2d 345 (9th Cir. 1993). In Dague, the Supreme Court held that enhancement above the lodestar amount for contingency risk is not proper for fee awards under 42 U.S.C. § 6972(e) or 33 U.S.C. § 1365(d). Davis extended Dague to calculation of the lodestar itself, and Gates extended Dague to § 1988 fee awards. We therefore vacated the attorneys' fees award and remanded for the district court to consider these cases.

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[2]Those hourly rates were as follows: Lynn Paltrow--$241.00; Rachel Pine--$241.00; Simon Heller--$25.00 (for services which could have been performed by someone of less skill and knowledge) and $135.00; Louise Melling--$135.00; Ellen Goetz--$100.00; and Andrew Dwyer--$80.00.

Defendants also argued that the district court erred by awarding attorneys' fees for the ACLU-RFP work performed on behalf of plaintiffs GNA and Laurie Konwith, who, defendants maintained, did not have standing. We instructed the district court to consider the standing issue on remand.

**D. Attorneys' Fees Award On Remand**

On remand, the district court declined to reduce the lodestar figure it calculated for local and ACLU-RFP counsel and also declined to reduce the 2.0 multiplier for AC & B. It concluded that even without considering the contingency risk, the hourly rates and multiplier were justified. The district court also rejected defendants' standing arguments. The district court awarded interest on all fees and costs to run from the date of the entry of initial judgment as well as interim "uncontested" fees to AC & B. The total amount of the award was $552,790.92.

Defendants now appeal the district court's decision on remand. Defendants contend the district court erred in determining counsel's hourly rate and in refusing to eliminate, or at least reduce, the multiplier upon remand. They also challenge the award of fees against the Governor of Guam and the award of interest.

## II. STANDARD OF REVIEW

[1][2][3] A district court's decision to award fees and their amount is reviewed for abuse of discretion. *Bouman v. Block*, 940 F.2d *696 1211, 1235 (9th Cir.), cert. denied, 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991). "The abuse of discretion standard applies not only to the basic fee computation, but also to the multiplier." *Id.* Factual findings supporting an award are reviewed for clear error. *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir.1992). Whether the district court applied the correct legal standard is re-

viewed de novo. *Notrica v. FDIC*, 2 F.3d 961, 964 (9th Cir.1993).

## III. DISCUSSION

### A. AC & B Award

[4][5] 42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of section[ ] ... 1983 ... of this title ... the district court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). "Reasonable fees" under § 1988 "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The burden is on the plaintiff to demonstrate "that the requested rates are in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n. 11, 104 S.Ct. at 1547 n. 11.

#### 1. Hourly rates

[6] There is no dispute here that the relevant community for the AC & B award is Guam. In setting the hourly rates, the district court properly considered declarations from Guam attorneys regarding the prevailing market rates. See Davis, 976 F.2d at 1547 ("We recently pronounced that declarations of the 'prevailing market rate in the relevant community ... [are] sufficient to establish the appropriate [billing] rate for lodestar purposes.' ") (alteration in original) (quoting *Bouman*, 940 F.2d at 1235).

Those affidavits clearly support the district court's determination that $ 175 per hour is the prevailing market rate for Ms. Arriola's services. For example, J. Bradley Klemm submitted an affidavit stating that $ 175 "is reasonable and well within the range of billing rates for attorneys on Guam for a case of this magnitude and controversy." James S. Brooks, who has practiced law on Guam since 1968, submitted an affidavit stating that $ 300 an hour would be reasonable given the complexity of the case, Ms. Arriola's experience in class action litigation, and the considerable hostility the suit engendered in the community. He further stated that he was "frankly surprised" at AC & B's usual hourly rates and that those rates seemed low when compared to the rates of other firms with which he was familiar. G. Patrick Civille submitted an affidavit stating that his firm would charge $ 200 an hour "for having a comparably experienced attorney handle a similar matter." Although defendants submitted affidavits suggesting that the prevailing market rate for Ms. Arriola's service would be less than $ 175 per hour, it was well within the district court's discretion to credit the affidavits supporting the $ 175 figure.

[7] Our colleague in dissent argues against an hourly rate of more than $150 for Ms. Arriola. Dissent at 712. Were the standard of review de novo, our colleague might be on firmer ground. However, a district court's finding is not clearly erroneous simply because an appellate judge would reach a different conclusion. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1317 n. 7 (9th Cir.) (quoting Anderson v. *City of Bessemer*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)),

cert. denied, 505 U.S. 1230, 112 S.Ct. 3056, 3057, 120 L.Ed.2d 922 (1992).[3]

*697 [8] Furthermore, it is perfectly appropriate for a district court to award an hourly rate higher than is customarily charged by the plaintiff's attorney or than is set forth in the retainer fee agreement. See *Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir.) (counsel's customary rate is not controlling), cert. denied, 484 U.S. 990, 108 S.Ct. 480, 98 L.Ed.2d 509 (1987); *Blanchard v. Bergeron*, 489 U.S. 87, 96, 109 S.Ct. 939, 946, 103 L.Ed.2d 67 (1989) (pre-existing fee agreement does not limit the amount of fees awardable under § 1988).

Having reviewed the affidavits, we conclude that the rates employed by the district court were in line with the prevailing market rates in Guam for attorneys of similar skill, reputation and experience handling similar matters. We further conclude, as did the district court, that the rates employed were fully justified quite apart from any consideration of contingency.

**2. Multiplier**

[9] Upon remand, the district court again applied a 2.0 multiplier to the lodestar figure. Acknowledging that contingency did factor into its original decision to enhance the lodestar figure, the district court noted that "the more important considerations ... were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community

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[3] As our colleague has so aptly stated in the past:

> Appellate judges should be aware of their limitations. They can guide and review, but they cannot run the show.

*United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir.1987) (Kozinski, J., concurring

of Guam." Thus, the district court found the 2.0 multiplier appropriate even without considering the contingency. The district court did not, as the dissent suggests, consider that counsel was precluded from other employment because of the time spent on this litigation as a reason justifying the fee award we now affirm. Nor did the district court apply a multiplier because of the "absence of other local counsel competent to handle this case." Dissent at 712-13 & n. 30. Rather, the district court found it unlikely that other qualified attorneys would have taken the case. [4]

We disagree with defendants' contention that a multiplier may never be applied to increase a fee award after Dague. The Dague opinion only discussed the permissibility of applying a multiplier to reflect that the prevailing party's attorneys were retained on a contingency fee basis. Dague left undisturbed earlier Supreme Court case law allowing a fee applicant to recover more than the lodestar figure where the applicant has met "the burden of showing that 'such an adjustment is necessary to the determination of a reasonable fee.' " Dague, 505 U.S. at 562, 112 S.Ct. at 2641 (emphasis added) (quoting Blum, 465 U.S. at 898, 104 S.Ct. at 1548).

[10] Moreover, we disagree with the dissent that the unavailability of willing local counsel is not a proper factor justifying an enhancement of the lodestar. Such an enhancement is clearly necessary to a reasonable fee where the district court finds that the case is of the type that attorneys are unwilling

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[4] In its Appendix B, the dissent, going to great lengths in an attempt to prove this point, lists other Guam and Saipan attorneys who might be competent to handle this type of case. In doing so, the dissent winds up proving the solid basis for the district court's finding: none of these lawyers came forward to say they would have taken this case and at least one of them (J. Bradley Klemm) submitted an affidavit stating that most local firms would be unlikely to take on such a case. Infra. at 713 n. 31.

to take for fear of ostracization and out of concern for their personal safety. Such a consideration is not ordinarily reflected in the lodestar, and we find that it was clearly not reflected in the lodestar in this particular instance. See Stewart, 987 F.2d at 1454 (recognizing that, after Dague, enhancement is still appropriate in limited circumstances on the basis of factors not fully reflected in the basic fee).[5]

*698 [11] In the alternative, the dissent contests the district court's factual finding that plaintiffs were unlikely to have found other local counsel. In this regard, the district court was faced with a credibility determination. Plaintiffs presented the affidavit of J. Bradley Klemm, who stated that "most local firms would be unlikely to accept a case such as GSOBGYN " given the position of the Catholic church on the issue and the class action nature of the lawsuit and that had AC & B "not pursued this case, the plaintiffs would have found it extremely difficult, if not impossible, to obtain local experienced counsel." On the other hand, defendants presented the affidavit of Linda Ingles who stated she did not believe "that the ACLU and the Plaintiffs would have experienced difficulty in obtaining local counsel so that the challenge to the law could proceed in federal court" because

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[5]Courts outside the Ninth Circuit have also recognized that enhancement for factors other than contingency may still be appropriate after *Dague*. See, e.g., *Grant v. Martinez*, 973 F.2d 96, 100 (2nd Cir.1992) (recognizing a "strong presumption" that lodestar represents a reasonable fee, but noting that other considerations may lead to upward or downward departure from lodestar), *cert. denied*, 506 U.S. 1053, 113 S.Ct. 978, 122 L.Ed.2d 132 (1993); *Shipes v. Trinity Industries*, 987 F.2d 311, 323 (5th Cir.1993) (recognizing that enhancement for results obtained may be warranted), *cert. denied*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993); *Velazque Hernandez v. Morales* 810 F.Supp. 25, 28 (D.P.R. 1992) (in exceptional case, court may still upwardly adjust lodestar based upon factors other than contingency).

the plaintiffs in a Guam asbestos class action suit had no difficulty obtaining local counsel. We cannot say that the district court clearly erred in choosing to believe one affidavit rather than the other, especially in this case, where the basis for Klemm's opinion appears more relevant.

Nonetheless, the dissent insists that the district court's finding that there was a likelihood no other attorney on Guam would have taken the case is clearly erroneous because AC & B did take the case and GNA and Laurie Konwith were able to get off-island counsel. The dissent also speculates that because plaintiffs were able to obtain declarations from various Guam residents who oppose the law, plaintiffs likely could have found other local counsel.

[12] A district court's factual findings are reviewed in light of the record, not speculation. Although one could speculate that other attorneys on Guam might have agreed to represent plaintiffs if offered the opportunity because lawyers have a moral obligation to represent those with unpopular views and might be able to sign a million dollar book deal when the case is over (Dissent at 717 n. 38), one could just as easily speculate that only a lawyer with a strong pro-choice philosophy and extensive public interest law experience would have taken this case, of which one could speculate there are few on Guam. However, as judges, we are not permitted to engage in such speculation. We are confined to the evidence in the record and those inferences that directly follow from that evidence. Based upon the record in this case, the district court was not clearly wrong in its conclusion that plaintiffs were unlikely to find other local counsel.

Moreover, that two of the other plaintiffs hired off-island counsel, on this record, seems to us to support, rather than contradict, the district court's finding that there was a "likelihood that no other attorney on island would have

accepted the case."

Contrary to the dissent's contention, neither the majority here nor the district court in its original order "paint[ ] a picture of an island community where the public is virtually of one mind on the question of abortion, and where all dissent on the issue is quickly stifled."[6] Rather, the district court cogently explained why it believed it was unlikely that plaintiffs could have obtained other local counsel:

> The record reflects that plaintiffs' local attorneys accepted this case in the face of a unanimous Legislature, as well as a Governor who had taken a strong personal and political stand on the issue, despite both having been advised by the Attorney General that the law was unconstitutional. The Roman Catholic Church had also spoken publicly, even threatening excommunication of opponents of the law. Ms. Arriola's affidavit states that she received death threats,[7] and encountered overt hostility *699 from members of the community. The Court notes,

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[6] A careful reader could not possibly believe we intend to suggest "that the people of Guam cannot tolerate a diversity of view on the question of abortion." What the evidence demonstrates, and what we intend to convey, is that there exists on Guam a strong and vocal anti-abortion community.

[7] The nature of the threat to Ms. Arriola's life is quite clear from the record. According to Ms. Arriola's affidavit, at a pro-choice rally on March 26, 1990, individuals in two low rider pickup trucks yelled that they had her number and that they were going to shoot her. C.R. 132, p. 3. Two police officers at the rally told her she should report the incident to the Chief of Police and that the Guam Police Department takes such threats seriously. Apparently it does, for after reporting the incident, officers patrolled her residence every hour on the hour and her office was patrolled regularly as well.

> and the record supports, that Guam is a relatively small and predominantly Catholic community and that this lawsuit was particularly emotionally-charged. Declarations of other local attorneys also indicate that plaintiffs would have had much difficulty finding local counsel, due to the high visibility of the case, the small size of the island, and the many conflicts of interest occasioned by the many parties involved. There is no doubt in my mind that this case was deemed extremely undesirable in the community and that local counsel faced unusual and trying personal and professional pressures during the pendency of this lawsuit.

Not being residents of Guam and given the record on appeal, we are not in a position to doubt the district court's view of the dynamics surrounding this case.

Moreover, that the people of Guam are not of "one mind" or that plaintiffs were able to find various Guam residents, mostly health care providers whose livelihoods are directly affected by the law, who are willing to speak out against the law, does not in any way detract from the district court's finding that most lawyers on Guam would not have taken this case.[8] Although the United States is hardly of "one-mind" on the issue of abortion, physicians are more and more reluctant to provide abortions in this country because of threats of ostracization and violence.[9] It is not clearly wrong to find that, for similar reasons, lawyers are likely to be reluctant to provide legal representation to individuals challenging anti-

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[8] It is important to note that two of plaintiffs' affiants were too afraid to use their real names.

[9] Delia O'Hara, "Abortion: MDs Who Do Them and Those Who Won't," American Medical News, February 8, 1989, at 13

abortion statutes. In sum, there is no reason to disbelieve Mr. Klemm's affidavit that plaintiffs would have found it "extremely difficult, if not impossible" to obtain experienced local counsel. Consequently, the district court did not err in enhancing the lodestar figure based upon this factor. Cf. *Gomez v. Gates*, 804 F.Supp. 69, 75 (C.D.Cal.1992) (concluding that Dague does not preclude enhancement for "undesirability" of excessive force case).

Finally, defendants contend that because contingency was a factor in the original decision, the district court necessarily should have reduced the multiplier on remand. We disagree. As long as the district court's 2.0 multiplier can be justified on the bases it mentioned in its remand decision-- without regard to contingency--it may be upheld. See *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 651 (9th Cir.1988) (affirming district court's choice of 2.0 multiplier despite its reliance on impermissible factors where the permissible factors alone amply supported the result). We find that the magnitude of the multiplier applied by the district court was reasonable in light of the factors upon which it relied.

**3. Time spent**

[13] The dissent questions plaintiffs' litigation strategy; whether, for example, it was appropriate for counsel to engage in certain discovery[10] and to spend as much time as they did preparing the summary judgment motion. But the dissent fails to mention that the reasonableness of the number of hours was irrelevant to the district court upon remand and irrelevant to us on appeal because defendants do not challenge the number of hours for which plaintiffs

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[10] Although a reading of the dissent would suggest an inordinate amount of time spent on depositions, defendants themselves admit that of the six depositions taken, all but one were less than two hours long.

request fees[11] and we do not generally consider arguments not *700 raised by the parties. See *Blackburn v. Goettel-Blanton*, 898 F.2d 95, 97 n. 6 (9th Cir.1990).

Furthermore, although it may be easy, in hindsight, to tout this as an easy case,[12] plaintiffs cannot be faulted for their thoroughness under the circumstances.[13] Although one could argue that plaintiffs need only have pled the legal theory that actually carried the day rather than the six additional theories pled, one must remember the status of Roe was extremely tenuous after Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), which was

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[11] In fact, in its original opposition to the fee application, defendants directly challenged only 43.3 of the approximately 1500 hours spent by counsel, of which 2.3 hours were AC & B's hours.

[12] We note that two experienced attorneys who submitted affidavits on plaintiffs' behalf stated that they believed this litigation involved complex issues.

[13] The dissent's position is interesting in light of *Blackburn v. Goettel-Blanton*, 898 F.2d 95 (9th Cir.1990), in which we upheld as reasonable an attorney's fee award of over $ 61,000 in a $ 6000 breach of contract action. The dissent, writing for the majority in that case, rejected the logic of the defendant's argument that because "the case was so simple--her breach of contract so self-evident--that plaintiffs could not have legitimately amassed" such fees. Id. at 97. Acknowledging that it often costs more than $ 6000 to hire an attorney to draft a complaint, we concluded that the award was justified, despite noting that the plaintiffs "sought extensive (and expensive) discovery" and "filed repeated motions to compel discovery and for sanctions." Id.

decided less than a year before this lawsuit was brought.[14]

The dissent questions the relevance of many of the affidavits submitted to support plaintiffs' claims. In fact, many of the criticized affidavits are directly relevant. For example, the affidavits regarding the effect of the statute on doctors and nurses were directly relevant to plaintiffs' claim that the

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[14] In *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the appellant and the United States as amici urged the Supreme Court to overrule *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court declined to do so because of the factual difference between the cases. While Roe involved a Texas statute criminalizing all abortions except when the mother's life was at stake, the statute at issue in Webster only outlawed abortions of viable fetuses. Roe had recognized a right to an abortion derived from the due process clause, but noted that this right is not absolute and at a particular point in time must yield to the state's interest in safeguarding health, maintaining medical standards and protecting life. Therefore, it was not necessary to overrule Roe's holding that there is a right to abortion derived from the due process clause in order to determine that the state can prohibit abortions after a fetus is viable. Importantly, however, the Court left open the possibility that Roe would be overruled in the future. Besides the plurality's subtle suggestion that it would consider overruling Roe if presented with a more factually similar case, Justice Scalia in his concurrence specifically expressly advocated overruling Roe. Moreover, Justices Blackmun, Brennan and Marshall lamented:

> [T]he plurality and Justice SCALIA would overrule Roe (the first silently, the other explicitly) and would return to the states virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term. Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that at sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed before January 22, 1973.
> 492 U.S. at 537-38 (Blackmun, J., dissenting).

statute is void for vagueness and violates the right to free speech. The affidavits regarding the subjugation of women on Guam and the medical benefits of abortion are relevant to plaintiffs' claim that the law violated the equal protection clause and the thirteenth amendment right to be free from slavery by robbing women of their bodily integrity and dignity and risking their lives and health.

Moreover, although it makes a much better study in contrasts to compare plaintiffs' motion for summary judgment with the eight paragraph opinion of the Guam Attorney General, the relevant comparison for purposes of determining whether plaintiffs' counsel spent inordinate amounts of time preparing their motion for summary judgment is between the motion and defendants' response in opposition. If plaintiffs' motion and accompanying declarations were as irrelevant and needlessly verbose as the dissent contends, defendants did not deem it appropriate to bring it to the attention of the district court. Rather, they saw fit to file a 65 page response supported by 108 pages of ***701** declarations and other attachments touching on topics similar to those addressed by plaintiffs. For example, several of the declarations defendants submitted are personal testimonials of women who have undergone abortions and who describe the physical, psychological and emotional pain they experienced from their abortions. Other declarations touch on such topics as the concept that life begins at conception,[15] the developmental stages of embryos and fetuses,[16] words in the Chamorro

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[15] Decl. of Douglas Eaton, M.D. and Thomas J. Yetman, M.D., CR 169, Ex. C and I.

[16] Decl. of Douglas Eaton, M.D., CR 169, Ex. C.

language that refer to pregnancy and the birthing process,[17] and the various methods of performing abortions.[18] Defendants also include a newspaper article regarding physicians who do and do not perform abortions and the reasons why[19]. Even if the reasonableness of the number of hours for which fees were awarded was at issue, we could not say, on this record, that the district court abused its discretion in awarding fees for the hours it did.

**B. ACLU-RFP Award**

**1. Standing**

[14] Defendants argue that GNA and Laurie Konwith are not entitled to attorneys' fees because they do not have standing. The district court found that GNA has standing because its members were subject to criminal prosecution under the statute. Specifically, the district court found:

> The GNA is a non-profit organization of 90 nurses who are registered on Guam and who provide medical care and treatment including abortion counselling and referral information to pregnant women. Every member of GNA was subject to criminal prosecution under the law, both for providing counseling and for participating in abortions.

Defendants note that under Guam law, persons who are not licensed as physicians may not perform abortions. 10 Guam Code Ann., Ch. 13, Arts. 1-3 (193). Defendants contend that

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[17] Decl. of Rosa Salas Palomo, CR 169, Ex. E.

[18] Decl. of Thomas Yetman, M.D., CR 169, Ex. I.

[19] Delia O'Hara, Abortion: MDs Who Do Them and Those Who Won't, American Medical News, February 8, 1989, at 13.

members of GNA are not legally entitled to perform abortions and therefore are not subject to prosecution under the statute. Although members of GNA may not be legally entitled to perform abortions, defendants have failed to demonstrate that GNA members are not allowed to and do not assist those who are legally entitled to perform abortions. It is clear that members of GNA would have been subject to prosecution for assisting a licensed physician during an abortion procedure given Guam's conspiracy laws. See 9 Guam Code Ann. §§ 4.60 (Guilt Established by Conspiracy); 4.65 (Criminal Facilitation Established and Punished); 13.30 (Conspiracy: Definition). Consequently, GNA had standing to bring this action as a representative of its constituents. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342, 97 S.Ct. 2434, 2440-41, 53 L.Ed.2d 383 (1977).

Defendants also contend that district court erred in concluding that the law did not prohibit abortion counseling. We disagree. The district court was likely relying upon § 31.23, which made it a misdemeanor to "solicit[ ] any woman to submit to any operation." This section certainly could have been construed as effectively prohibiting abortion counselling. In fact, we note that Janet Benshoof was arrested under this provision immediately after giving a speech to the Guam Press Club in which she informed the audience that abortions could be obtained in Hawaii and gave a phone number for further information. GSOB/GYN, 776 F.Supp. at 1426. In sum, it is beyond doubt that GNA had standing to contest the constitutionality of the statute.

[15] Although a fee award is made to a party, not to an attorney, we need not determine whether Ms. Konwith has standing because where, as here, two parties are represented by the same counsel who performed work benefiting both parties and the parties for all practical purposes present one

fee *702 request, that one party has standing is sufficient to justify the award of fees.[20]

**2. Hourly Rates**

[16] Defendants argue that the district court erred when it did not reduce the hourly rates it originally used to calculate the ACLU-RFP award. In its original order, the district court did mention that the ACLU-RFP attorneys faced the risk of not recovering fees as one of many factors justifying the hourly rates. However, it is clear from that order as well as the order on remand that the district court's primary focus was properly on the prevailing market rate for lawyers of the same skill, reputation and experience as the ACLU-RFP lawyers. The fees set by the district court were supported by affidavits from lawyers with two prominent private law firms in New York, as well as affidavits from the ACLU-RFP attorneys establishing their extensive skill and experience.

Defendants do not challenge the qualifications or skill of the ACLU-RFP attorneys. Nor do they contend that New York is not the relevant community for determining the prevailing market rate. Instead, they argue that the district court erred by not considering the ACLU's "customary and ordinary" fees. It is well-settled that fees "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." Blum, 465 U.S. at 895, 104 S.Ct. at 1547; see also *Miele v. New York State Teamsters Conference Pension & Retirement Fund*, 831 F.2d 407, 408-09 (2nd Cir.1987) (court may apply prevailing market rates for "Wall Street" firm to

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[20] Defendants admit as much. *See* Reply Brief at 8 n.1 (acknowledging that whether Father Cole as standing is irrelevant to the award of attorneys'fees for the work performed by AC&B because the other plaintiffs represwented by AC&B clearly had standing.

fee award for non-profit organization). Such a rule is necessary because public interest, non-profit firms may not charge their clients fees. Defendants have failed to demonstrate that the district court erred in assessing the skills of the ACLU-RFP attorneys or abused its discretion in relying on the affidavits establishing rates for private New York attorneys. The ACLU-RFP hourly rates will therefore be upheld.

**C. Interest**

[17][18] On remand, the district court awarded interest on all fees to run from November 12, 1991, the date of initial entry of judgment. Defendants argue that interest should only run from the date of the district court's decision on remand. We review the district court's award of interest for abuse of discretion. *Home Sav. Bank, F.S.B. v. Gillam,* 952 F.2d 1152, 1161 (9th Cir. 1991).

[19] 28 U.S.C. § 1961(a) provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of judgment.

The purpose of this provision is to compensate successful plaintiffs for the lost time between the ascertainment of the damage and the receipt of payment. *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835-36, 110 S.Ct. 1570, 1575-76, 108 L.Ed.2d 842 (1990). Like other circuits, we have rejected the idea that "post-judgment interest should apply only from the date of the second judgment whenever the first judgment is reversed and remanded." *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1298 (9th Cir.1984), cert. denied, 469 U.S. 1190, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985); see also *Perkins v. Standard Oil Co. of California,* 487 F.2d 672, 676 (9th Cir.1973). We agree with the Sixth Circuit that determining

from which judgment interest should run "requires an inquiry into the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment." *Bailey v. Chattem, Inc.*, 838 F.2d 149, 154 (6th Cir.), cert. denied, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988); see also *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1112 (5th Cir.1985) ("Unless the mandate of the appellate court alters the original judgment in more than relatively *703 minor respects, interest should attach from the date of the pre-appeal judgment"); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1211 (7th Cir.1989).

Applying these principles to the case at hand suggests that the district court was correct in awarding interest from the date of entry of the original judgment. It is significant that we vacated the district court's original attorney's fees award so the district court could consider intervening case law. We did not reverse the district court, nor did we conclude that the district court's award was erroneous or unsupported. This case is therefore clearly distinguishable from those cited by defendants, where the original judgment was reversed on the merits or found to be wholly unsupported by the evidence. Cf. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F.Supp. 1393, 1406 (E.D.Pa.1988) (awarding interest on recalculated fee award from date of original award, notwithstanding fact that original award was vacated by court of appeals). Our decision today is not contrary to Kaiser because Kaiser simply precludes the award of post-judgment interest from the date of initial judgment where it has been determined that the initial judgment was not supported by the evidence. Because we did not previously determine whether the initial award was supported by the evidence and because we now conclude that the district court's original fee award was supported by the factors it mentioned--without regard to

contingency--interest clearly should have been awarded from the date of the original award. **See** *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir.1980) (noting that in cases allowing interest only from the date of judgment after remand, there was no "basis for recovery of the amount on which interest was sought until the appellate court reversed and remanded for entry of judgment").

Defendants contend that the interest should not run from the original judgment because we did not mention the award of interest in the mandate vacating and remanding the case to the district court. They base their argument on Fed.R.App. P. 37 which provides in relevant part:

> If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to the allowance of interest.

Rule 37 is inapposite because we never directed that a money judgment be entered in the district court. To the contrary, we vacated the money judgment so the district court could reconsider its ruling.

[20] The district court did err, however, insofar as it awarded interest from the date of entry of the original judgment on fees that were awarded for the first time on remand. Those fees represent work performed after the original fee award was vacated. The district court should not have awarded interest on those fees as of the date of the original fee award because the work had yet to be performed. See Perkins, 487 F.2d at 676; *United States v. Hougham*, 301 F.2d 133, 135 (9th Cir.1962); **see also** *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 927 (3rd Cir.1985).

**D. Interim Fees**

[21] Defendants also challenge the district court's award of interim fees on remand. However, defendants cite no persuasive authority for their position that interim fees were unwarranted. We have previously recognized that "[t]here is no reason to delay receipt of ... undisputed fees." *Fadhl v. City and County of San Francisco,* 804 F.2d 1097, 1099 (9th Cir.1986) (noting that delays in the payment of fees may deter attorneys from undertaking representation). Here, the district court awarded interim fees to AC & B only at the uncontested rate of $120.00 per hour. Defendants' implication in its brief that these fees were contested is not supported by the record. At oral argument on remand, the district court specifically asked about this:

> - The Court: "You don't dispute that $120 per hour for all the hours she claimed, do you?"
>
> Defense Counsel: "No."

Defense counsel also stated that "if any of the fees are contested ... it's the fees of the ACLU." On this record, the district court ***704** did not abuse its discretion by awarding interim fees.

**E. Fees Against The Governor Of Guam**

[22] The final argument raised by defendants is that no fees may be awarded against the Governor of Guam because he is not a "person" within the meaning of § 1983. This argument was raised and rejected in the merits appeal. See GSOB/GYN, 962 F.2d at 1370-71. Defendants claim that an intervening Supreme Court opinion, *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), suggests that the issue was improperly decided. However, Suter was actually decided before the merits appeal was decided, and,

in any event, is inapplicable.[21] In addition, defendants have clearly waived the right to argue the issue in this appeal, since they did not pursue it in their petition for certiorari challenging the merits appeal or in any of the prior fee proceedings.

**F. Motion For Sanctions**

[23] Plaintiffs filed a separate motion for sanctions, under Rule 38, Federal Rules of Appellate Procedure, and 28 U.S.C. § 1927, based upon defendants' inclusion of the above argument in their brief on appeal. We have carefully reviewed the record and conclude that sanctions are not warranted. This issue was only one of many raised by defendants in this appeal. As we have previously stated, "Fed.R.App.P. 38 authorizes sanctions for a frivolous appeal, not for a frivolous argument." *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1005 (9th Cir.1987). Moreover, we find no evidence that defendants acted in "bad faith" so as to warrant sanctions under § 1927. See *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 628 (9th Cir.1987). The motion for sanctions is denied.

## IV. CONCLUSION

We affirm the district court's award of fees on remand, except to the extent that the district court imposed interest from the date of the initial judgment on fees for work that was performed after the initial judgment. We remand to the district court for proceedings consistent with this opinion.

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[21] *Suter* held that the Adoption Assistance and Child Welfare Act does not create rights enforceable in an action under § 1983 and does not create an implied private cause of action. It said nothing about the meaning of "person" under § 1983, or whether territorial officials may be sued for injunctive relief under § 1983.

Costs on appeal to plaintiffs-appellees.

**KOZINSKI,** Circuit Judge, dissenting in part:

> "I would have to say that [in] eight years on the bench, this is the easiest issue that I've ever been confronted with."
>
> --Judge Alex R. Munson[1]
>
> "Contrary to conventional wisdom, Guam is apparently not overwhelmingly'pro- life.' "
>
> --Anita P. Arriola, Esq. & Simon Heller, Esq.[2]

The majority opinion, and the district court orders it affirms, give the distinct impression that the lawyers of Guam and Saipan[3] are a bunch of spineless yokels--unfit to handle complex cases, daunted by tough legal issues, strangers to constitutional litigation, cowed by public opinion and lacking the pluck to stand up for the rights of their fellow citizens. The same documents also suggest that the underlying litigation--for which plaintiffs' attorneys are awarded hundreds of thousands of dollars--was immensely difficult and required formidable legal skills. Finally, one is led to believe that the people of Guam are of one mind in opposing abortion, and that the very few who disagree live in fear of their lives and livelihoods.

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[1] R.T. 3-26-90, CR 18, at 7.

[2] Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. and Perm. Inj., CR 120, at 18 (quoting Decl. of R. Rogers, Ex. A).

[3] While this case arose in Guam, the two islands are only about as far apart as Los Angeles and San Diego--about 40 minutes by air. Lawyers from one jurisdiction regularly practice in the courts of the other and even the district judge in this case is domiciled in Saipan.

None of this is true.

This is not a case where plaintiffs tried to get a lawyer but were repeatedly rebuffed. *705 Cf. *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 651 (9th Cir.1988) (per curiam) (*Fadhl* was turned down by 35 attorneys; court applied multiplier in light of this "extraordinary difficulty" finding representation). So far as the record discloses, the Guam Society of Obstetricians and Gynecologists (GSOBGYN) retained the very first lawyer it contacted; the other plaintiffs did not consult local counsel at all, but hired lawyers who came from another hemisphere (35 hours of flight time--all billed at New York City rates).[4] Plaintiffs were, of course, free to hire the attorneys, local or otherwise, in whom they had confidence. But they were not entitled to have someone else pay extraordinary legal fees when there were plenty of local lawyers who could have handled the case at normal rates. The contrary finding--which is the fulcrum of the district court's ruling and our opinion today--is an affront to the dignity and reputation of a community of lawyers who have consistently served their clients and this court with professionalism and dedication.

Furthermore, the case was laughably easy. Long before suit was filed, Guam's attorney general--appointed by the same governor who signed the abortion bill-- wrote a terse opinion letter predicting with surgical precision the outcome of the litigation. See App. A. The district judge's finding that this was a hard case is belied by the record and his own words and rulings. See pp. 705-06 infra. Finally, the insulting suggestion that the people of Guam do not hold, and cannot tolerate, a diversity of views on the question of abortion is refuted by plaintiffs themselves.

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[4] Decl. of Simon Heller (Heller Decl.), CR 275, Ex. A, at ii-iii.

The record thus provides no justification for the number of hours, the hourly rates or the multiplier approved by the district court. The fee award here is not reasonable compensation for services prudently rendered; it is a bounty paid to plaintiffs' lawyers for having reeled in a fat and rather sluggish fish. We abjure our responsibility by affirming this punitive award.

**The Underlying Litigation**

On March 8, 1990, the Guam territorial legislature passed "the most restrictive anti-abortion law enacted under the U.S. flag." Decis. and Order After Remand re Award of Att'y Fees and Costs (Second Fee Award), CR 340, at 7. The law was a frontal assault on *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), as it "ma[de] no attempt to comply with Roe." *Guam Soc'y of Obstetricians & Gynecologists Ada,* 962 F.2d 1366, 1371 (9th Cir.1991), *cert. denied*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992). "With two narrow exceptions, [the law] simply negat[ed] the rights and interests of the pregnant woman and forb[ade] her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of Roe." Id. at 1372.

Even before final passage, GSOBGYN had organized a legal challenge and hired Anita P. Arriola and the firm of Arriola Cowan & Bordallo (AC & B) as its counsel.[5] Plaintiffs filed their complaint four days after the law went into effect and easily obtained a temporary restraining order, which was then turned into a preliminary injunction. R.T. 3-26-90, CR 18, at

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[5] Decl. of Anita P. Arriola in Supp. of Pls.' Application for Att'ys Fees and Costs (First Fee Applic.), CR 258, Ex. C, at 1. In fact, it appears to have been Arriola herself who organized the challenge and alerted the national office of the ACLU. Jane Gross, Guam Approves Bill Posing Challenge to Abortion Ruling, N.Y. Times, March 16, 1990, at A1.

6.

Other than the law's validity, the case presented only two substantive questions: Does the Due Process Clause apply to Guam at all? And, could Governor Ada be enjoined from enforcing the law, either in his official or individual capacity?[6]

*706 The district court certainly had no difficulty with this case: "After the emotionalism and stridency of the opposing views are stripped away, the strict legal issue before the court is not one difficult of resolution: Is *Roe v. Wade* the law in the Territory of Guam?" *Guam Soc'y of Obstetricians & Gynecologists v. Ada,* 776 F.Supp. 1422, 1426 (D.Guam 1990). The court did not conceal its disdain for defendants' arguments, describing one as "unusual" and noting that it had "no known precedent in American jurisprudential history." Id. at 1427. Defendants appealed and we easily affirmed, holding that "it would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead." 962 F.2d at 1373.

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[6] Neither question was very hard; our opinion gives them short shrift. 962 F.2d at 1370-71. The first, we held, was readily answered by the 1968 Mink Amendment which "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of Roe was founded." 962 F.2d at 1370. We recognized that "the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam," id., but we disposed of this argument in two sentences: "We can scarcely imagine .... any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments 'have the same force and effect' in Guam as in a state of the United States. There is no need, therefore, to go further." Id. The second question was quite the chestnut by comparison, requiring four full paragraphs to resolve. Id. at 1371. We pointed out that section 1983 applies to persons acting under color of law of "any State or Territory"; and while territories, like states, aren't "persons" under section 1983, under well-settled law, suits against officials acting in their official capacities aren't suits against the state.

To call this an easy victory is an understatement; it was a rout. The outcome in our court and the district court was preordained. Defendants' only hope lay in persuading the Supreme Court to grant certiorari and overrule Roe. The Court, however, declined, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992), and that was that.

**The Fee Application**

Flush with success, plaintiffs presented a fee application not remarkable for its modesty. Although Arriola, then an associate with eight years' experience, was billing clients $120 per hour, she asked for an hourly fee of $175. First Fee Applic. at 3, 12. She also asked for a multiplier of two, to reflect the contingent nature of the litigation and the fact that this was, in her view, an undesirable case. Id. at 2. The ACLU, counsel for Laurie Konwith & Guam Nurses Association (GNA), the remaining plaintiffs, asked for rates charged by New York City law firms; they too requested a multiplier. Heller Decl.; Second Decl. at 2.

The district court approved every single hour billed by plaintiffs' counsel; awarded Arriola the enhanced hourly rate and the multiplier she requested; and gave the ACLU an award based on New York City rates. Decision and Order re Award of Att'y Fees (First Fee Award), CR 310.

Guam appealed and we reversed, citing *Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir.1992), and *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir.1992), vacated in part on other grounds, 984 F.2d 345 (9th Cir.1993), which held that contingency is not properly considered when calculating the hourly rate or granting a multiplier. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, Nos. 91-16910 & 92-15064, 1993 WL 337544 (9th Cir. Oct. 8, 1993) (mem.).

"[T]he district court erred," we said, "by considering the risk that counsel would not be paid for their services when it set the hourly rates upon which it calculated the ... lodestar of AC & B." Id. at **1.

On remand, the district court reinstated the fee award in full--and then some.[7] While admitting that the contingency fee arrangement "did factor into the court's first decision," it nevertheless held that the enhanced hourly rates and the multiplier were justified in their entirety by other "more important" considerations, such as "the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case." Second Fee Award at 6.

**The Standard of Review**

An award of attorney's fees under a fee-shifting statute isn't a prize to the winning lawyer. Rather, it compensates the prevailing ***707** party for legal fees prudently incurred. Normally this consists of a reasonable hourly rate, multiplied by a reasonable number of hours (the lodestar). There is a "strong presumption" that an attorney's fee award may not exceed this figure. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728, 107 S.Ct. 3078, 3088, 97 L.Ed.2d 585 (1987). On rare occasions, a court may grant a multiplier to account for factors not adequately reflected in

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[7] The second fee award exceeded the first by $7,615.80. Compare First Fee Award at 21-22 with Second Fee Award at 7-9. The difference covered time and costs spent largely on preparing the second fee application. See Decl. of Anita P. Arriola in Support of Mem. on Remand, CR 332, Ex. G. Defendants were thus penalized for winning in the first fee appeal. Since we held that the district court had erred in approving the first fee award, I can see no justification for charging defendants for preparing the first (erroneous) fee application and then again for its successor.

the lodestar. *Blum v. Stenson*, 465 U.S. 886, 896-97, 104 S.Ct. 1541, 1547- 48, 79 L.Ed.2d 891 (1984). Whether a multiplier is available in these circumstances at all after *Dague* is in doubt. See pp. 712-14 infra. What is clear is that, if a multiplier is employed, it may not be based on the fact that the attorney's recovery is contingent. *Gates*, 987 F.2d at 1403.

While we owe much deference to the district judge, we are not a big rubber stamp. We have the record and can make informed judgments about all the key issues. When the district court's findings are illusory, we may not affirm; when the district court abused its discretion, we may not affirm; when the district court failed to adequately explain its reasons, we may not affirm. Where, as here, the district court made every one of these errors, we must reverse.

**The Number of Hours**[8]

Because this case left little room for legitimate differences of opinion, the district court's "findings" about the "novelty and difficulty of the questions presented" and "the particularized skill necessary to address the constitutional issues presented," *First Fee Award* at 6-7, are contradicted by the

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[8] The majority refuses to consider the time plaintiffs' counsel spent on the litigation based on the quaint notion that the "reasonableness of the number of hours was irrelevant to the district court upon remand and irrelevant to us on appeal because defendants do not challenge the number of hours for which plaintiffs request fees and we do not generally consider arguments not raised by the parties." Maj. op. at 699 (footnote omitted). But we have held that the district court must satisfy itself that the hours billed are reasonable, and articulate its reasons for its finding, even without an objection. *Neft v. Vidmark, Inc.*, 923 F.2d 746, 747 n. 1 (9th Cir.1991). Moreover, without knowing how many hours were reasonably spent on the project, how can we figure out the lodestar, which is the reasonable number of hours times the hourly rate? And, without the lodestar, how can we figure out whether Arriola is entitled to an enhanced rate and multiplier?

record. The case, moreover, raised only legal issues: Was the Guam abortion statute consistent with *Roe v. Wade*? Is the governor of Guam a "person" under 42 U.S.C. § 1983? Does the Mink Amendment extend the Due Process Clause, as now interpreted, to Guam?

Nevertheless, plaintiffs spent much time on discovery. They noticed the depositions of Governor Joseph F. Ada;[9] June S. Mair, a legislative staffer to the senator who had sponsored the abortion statute;[10] and Police Chief Adolf P. Sgambelluri.[11] They also sought and obtained such items as drafts of the abortion bills; memos from the attorney general to the police chief; crime statistics; memos from the police chief to his staff; and copies of the governor's speeches. See Dep. of Joseph F. Ada (Ada Dep.), CR 254; Dep. of June S. Mair (Mair Dep.), CR 187; Dep. of Adolph P. Sgambelluri (Sgambelluri Dep.), CR 188; First Fee Applic., Ex. C. The discovery effort spawned a good bit of satellite litigation. For example, the parties disagreed about whether Governor Ada could be deposed. The matter was briefed and argued and, in an inexplicable ruling, the district court permitted the deposition.[12]

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[9] CR 34

[10] CR 31.

[11] CR 99.

[12] The district court allowed the governor to be deposed "on all actual issues, including those relating to his decision-making process in signing into law Public Law 20-134." Order Den. Mot. for Protect. Order (Den. of Prot.), CR 38, at 5. The district court's ruling was premised on the theory that *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), calls for an inquiry into the subjective motivations of all those involved in passing legislation challenged on Establishment Clause grounds: "If

*708 None of the discovery was remotely germane to the purely legal issues presented. The questions at the deposi-

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plaintiffs' allegations are correct, Governor Ada's motivation in signing Public Law 20-134 could reasonably lead to the discovery of admissible evidence and is, therefore, relevant." Den. of Prot. at 3.

Under the district court's ruling the President, all governors, all members of Congress, all state legislators and all officials involved in the legislative process at the local level would be subject to an inquiry about their motives for signing onto legislation challenged under the Establishment Clause. I rather doubt this is what the Supreme Court had in mind when it decided Wallace; I am aware of no other court which has permitted such an inquiry.

Two other aspects of the district court's ruling are alarming. First, the court held that "Governor Ada's publication of his elaborate decision-making process acted to waive whatever claim of privilege Governor Ada may otherwise have invoked." Den. of Prot. at 4. But it is quite common for an executive to explain his reasons for signing particular legislation, see, e.g., William J. Clinton, Statement on Signing the Farm Credit System Reform Act of 1996, 32 **Weekly Compilation of Presidential Documents** 237, 259-260 (1996). It is equally common for legislators to explain their reasons for supporting legislation, by way of statements made on the floor, during committee hearings or in committee reports. I have much difficulty figuring out how activities we have come to accept as a standard part of the legislative process do not, under the district court's rationale, become a wholesale waiver of executive and legislative privilege.

Finally, the district court held that, even if not waived, the privilege was outweighed by the plaintiffs' great need for the testimony. If plaintiffs' "need" for the testimony was great enough to outweigh a claim of privilege where plaintiffs already had a slam-dunk winner under *Roe v. Wade*, I can't imagine a case challenging a statute under the Establishment Clause where executive privilege would not be set aside.

While we have had no occasion to review this ruling on the merits, we must surely consider it in judging whether plaintiffs' expenditure of legal fees was appropriate. That Arriola was able to lead the district court so deeply into error may be a tribute to her persuasive powers, but it does not make her expenditure of resources for that purpose prudent or justified.

tions ranged from the irrelevant to the inappropriate.[13] No

[13] Governor Ada, for example, was asked:

You have never served as an altar boy or in a choir? [Ada Dep. at 3.]

Have you ever before signed a bill into law where you were advised by the Attorney General or any other person that the bill was unconstitutional? [Id. at 7.]

Are you aware that different religions have different beliefs about abortion? [Id. at 10.]

Did you attend the mass at the Agana Cathedral just prior to [the pro-life] rally [held at the Governor's office just after he signed the bill]? [Id. at 16.]

June Mair, assistant to Senator Arriola, was asked:

Do you know whether the Senator ever read [*Roe v. Wade*]? [Mair Dep. at 14.]

Has [the Senator] ever discussed with you how she ... obtained [her] belief [that life begins at conception]? [Id. at 16.]

But you specifically told [the Senator] that *Webster [v. Reproductive Health Servs.*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989)] did not overrule *Roe versus Wade* ? [Id. at 19.]

Can you tell me who the majority of [the Senator's] colleagues are who believe [Roe v. Wade is error]? [Id. at 21.]

What were the contents of your discussion [with Senator Arriola about the attorney general's opinion letter]? [Id. at 34.]

Did you or Senator Arriola ever receive any other legal opinion about Bill 848 apart from the Attorney General's opinion? [Id. at 35.]

Adolph Sgambelluri, Chief of Police, was asked:

If the Community of Guam wanted you or insisted that you enforce Public Law 20-134, would you devote any funding or resources to putting in hidden cameras in clinics and doctors' offices to try to find out if any doctors are performing illegal abortions? [Sgambelluri Dep. at 39.]

Do you know what the breakdown is between males and females [in the Guam Police Department]? [Id. at 5.]

Chief, does the Guam Police Department have sufficient resources, including police officers and funding, to enforce all of the laws of Guam that are already on the books, excluding Public Law 20-134? [Id. at 11.]

Do you know whether the [women's prison], at the time that you were at [the Department of Corrections], had any rules or regulations allowing women prisoners at the detention facility to breast feed

plaintiff paying legal fees out of his own pocket would have authorized such frolics and detours--unless it was for the purpose of harassing the other side. But this was a case where victory was assured so plaintiffs expected to pay nothing. Spending someone else's money is always much easier than spending one's own, but our job--and the district court's--is to compensate plaintiffs only for legal fees reasonably incurred. The hours spent on discovery were not reasonably incurred; I would exclude them from the calculation of the lodestar.[14]

*709 Plaintiffs also spent an inordinate amount of lawyer time preparing their summary judgment motion. The motion, with its 32 supporting declarations, is a wondrous thing to behold: It takes up three volumes of the record and fills 370 pages--the motion alone is 97 pages of interminable prose--and wades into such dubiously germane areas as the likely effects of the abortion statute on unwanted children[15]

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their children? [Id. at 16-17.]

[14] My colleagues graciously cite my opinions, but, unfortunately, they sometimes miss the point. For example, *Blackburn v. Goettel-Blanton*, 808 F.2d 95 (9th Cir. 1990), cited by the majority at 700 n. 13, was not a case, where plaintiffs had a single objective and went about achieving it eight different ways. The whole point of *Blackburn* was that plaintiffs tried to parlay a six thousand dollar contract claim into something much more lucrative by means of various exotic legal theories.
At least they didn't spell my name Kaczynsky.

[15] Decl. of Henry P. David, Ph.D., CR 116, Ex. G. Dr. David cites a study showing that "[c]hildren born to mothers who had sought and been denied abortions tended, as young adults, to be more dissatisfied with the general development of their lives, their partner relationships, and personal friendships than the control group." Id. at 4-5. The point seems to be that these children would have been spared all these troubles had they not been born.

doctors,[16] teenagers[17], and nurses;[18] the practice of abortion in Guam over the ages;[19] absence of public support for the abortion statute;[20] the effects of the anti-abortion policy of Nicolae Ceausescu of Romania;[21] multiple personal testimonials to the benefits of abortion;[22] the subjugation of women on Guam;[23] and herbal and "traditional" methods of inducing abortion.[24] Most of the materials in the motion and its attachments are poignant and heartfelt, but of no conceivable relevance. Plaintiffs' summary judgment motion reads far more like a legislative record than a brief in a court of law.[25]

Contrast this Dickensian tome with the crisp, elegant

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[16]Decl. of Edmund A. Griley, M.D., CR 116, Ex. M.

[17] Decl. of Kirk Bellis, D.O., CR 116, Ex. B.

[18] Decl. of Rita Lilian Bevacqua, R.N., CR 116, Ex. E.

[19] Decl. of Laura Thompson, Ph.D., CR 116, Ex. Z.

[20] Decl. of Robert F. Rogers, Ph.D., CR 116, Ex. V.

[21] Decl. of Henry P. David, Ph.D., CR 116, Ex. G.

[22] Decls. of Evangelista Doe; Manuela Doe; Linda Stark; Marilyn Wingfield, CR 116, Exs. H, I, X, BB.

[23] Decl. of Cynthia Naval, CR 116, Ex. S.

[24] Decl. of Ann Workman, CR 116, Ex. CC.

[25] The majority suggests that plaintiffs' motion was just the right length, pointing to the fact that defendants "saw fit to file a 65 page response supported by 108 pages of declarations and other attachments touching on topics similar to those addressed by plaintiffs." Maj. op. at 701. The comparison is inapt. Since plaintiffs moved for summary judgment on all fronts, defendants had no choice but to respond in kind.

opinion letter from Attorney General Elizabeth Barrett-Anderson which, in eight no-nonsense paragraphs, tells precisely why the bills that eventually became the Guam abortion statute could not possibly be constitutional. The letter says all that could reasonably be said on the subject. It accurately foreshadows the ruling of the district court and our own merits opinion. It is an elegant piece of legal craftsmanship, proving once again that there's no substitute for well-honed professional judgment.[26]

According to their records, plaintiffs' attorneys spent just short of 700 hours preparing the summary judgment motion and the reply. **First Fee Applic.; Second Decl. & Exs.**; Decl. of Joaquin C. Arriola, CR 263; Decl. of Mark E. Cowan, CR 264. Was this time reasonably necessary? Surely not. It was an excess, vastly out of proportion to the problem presented. Whether this was born of inexperience or an abundance of caution, the fact remains that the great majority of these materials had no bearing on the outcome of the case and are in no way reflected in our opinion or the district court's ruling. Plaintiffs were free to spend the time, of course, but not at defendants' expense.[27]

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[26] For the edification of the bar, I reproduce the attorney general's opinion letter as Appendix A.

[27] The majority argues that the hours spent by plaintiffs' counsel were justified because "the status of Roe was extremely tenuous" at the time. Maj. op. at 700. This argument was not advanced by plaintiffs, nor considered by the district court; defendants have not had an opportunity to address it. Even without this input, it's clear that this is highly problematic theory on which to approve the bulk of the fee award. To begin with, it's not clear how this justifies spending the additional hours at this stage of the litigation. Since the Guam statute was clearly invalid under Roe, neither the district court nor we had any reason to pass on the other theories. And, had the Supreme Court had chosen to reconsider Roe, it is out of the question that it would also have taken up plaintiffs'

*710 It is to forestall such gorging at the litigation trough that the Supreme Court requires district courts to "provide a concise but clear explanation of [their] reasons for [a] fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40. We have interpreted this as requiring "something more tha[n] a bald, unsupported amount." 977 F.2d at 1306. Elsewhere it's been said that the district court "has to make a judgment ... in a reasoned (though brief) opinion--on what the case should have cost the party who submitted the request." *Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1204 (7th Cir.1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985).

In *Neft v. Vidmark, Inc.*, 923 F.2d 746 (9th Cir.1991), we noted that "[p]laintiffs did not file any opposition" to the fee application and the district court had simply approved the prevailing party's request in full. *Id.* at 746. We reversed with following instructions:

> Although the district court considered an itemized

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other claims--especially without a ruling on them below. In the unlikely event that Roe had been overruled, plaintiffs would not have been thrown out of court; they merely would have suffered denial of summary judgment on a single claim. They would then have been entitled to litigate one or more of the other legal theories on which they rely.

Which leads to an even more basic problem. Because no one has ever examined plaintiffs' other claims, it's impossible to tell whether many of them presented plausible arguments, much less winning ones. Suffice to say that, had plaintiffs lost under Roe, their other claims, some of which are summarized by my colleagues, maj. op. at 701, were dicey.

Finally, even were we to conclude that the expenditure of legal fees on these collateral issues was appropriate to the circumstances, I question whether it is legally permissible to saddle these defendants with the burden of financing the ACLU's nationwide contingency plan in case Roe was overruled. So far as I am aware, no court anywhere has relied on this theory for approving such a massive expenditure of lawyers' fees.

> list of services performed by defendants' counsel, ... the court simply stated that it found 'the amount claimed to be reasonable' and awarded that amount. *The court did not articulate any reasons why it found the amount reasonable, and thus gave this court no basis for determining whether or not the district court abused its discretion.* Upon reconsideration, the district court must provide 'a concise but clear explanation of its reasons for the fee award.'

Id. at 747 n. 1 (collecting cases) (emphasis added).

How did the district judge's explanation measure up to this standard? Here is everything he disclosed about his thinking in the matter:

> The Court has carefully reviewed the documentation of hours supplied by plaintiffs in support of their request for attorney fees and finds that the 1,487.26 hours claimed by plaintiffs were reasonably and necessarily spent by plaintiffs in their prosecution of this lawsuit and that plaintiffs' attorneys exercised appropriate billing judgment, given the novelty and difficulty of the questions presented by Guam's status as a territory, the extreme time limitations imposed by the circumstances, the particularized skill necessary to address the constitutional issues presented, and the experience of the attorneys involved.

First Fee Award at 6-7 (footnotes omitted).[28]

The majority seems satisfied with this explanation, but does

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[28] I refer to the first fee award because in its second fee award "the court adopt[ed] and fully incorporat[ed] [in relevant part] its June 25, 1991, order awarding attorney fees and costs...." Second Fee Award at 6 n. 7.

it tell us anything useful? Does it reflect the careful review of the record the Supreme Court's and our cases demand? All the district judge says is that it was reasonable for plaintiffs to spend nearly 1,500 hours on the case, but he does not tell us why this is so. Was it reasonable or necessary for counsel to engage in discovery? Was it reasonable to file an elephantine summary judgment motion? Was it reasonable to spend time deposing the governor, the chief of police, or a legislative staffer? Was *711 it reasonable to inflict upon opposing counsel and the court the burden of reading dozens of affidavits having nothing to do with the issues in this case?

These are the questions the district court fails to address. Yet without answers to these questions--good persuasive answers--I don't see how we can affirm the district court's determination that the hours spent by plaintiffs' counsel were reasonable. The majority's ruling conflicts with Neft.

**The Hourly Rate**

The number of hours and the hourly rate play off against each other. Experienced lawyers are entitled to a higher rate in part because they can accomplish more in less time. Conversely, where lawyers spend more time than expected, this calls for a lower hourly rate as it shows inexperience or lack of professional competence. For the reasons I explain above, the number of hours spent by plaintiffs' counsel is, by any reasonable standard, way out of proportion to the difficulty of the case. If my colleagues are unwilling to reduce the number of hours by recalculating the lodestar, they must nevertheless consider counsel's inefficiency when determining the appropriate hourly rate.

Arriola introduced evidence that, during the bulk of the litigation, she was an associate at her firm and that her time was billed at $120 per hour. First Fee Applic. at 12. The fee

~~agreement with GS~~OBGYN provided ~~that the firm would be~~ paid "at least $120 [per hour]" for her work. First Fee Award at 8. Based on plaintiffs' showing, the district court found that associates with Arriola's years of experience were billed at rates ranging from $100 to $150 per hour. Id. at 9.

Defendants too presented evidence concerning prevailing rates. Attorney General Barrett-Anderson submitted a declaration stating that attorney Monessa G. Lujan was retained as special counsel to represent the governor in this litigation at a rate of $125 per hour. Another attorney, Patrick Wolff, was hired to represent one of the defendants for $100 per hour. The attorney general also noted that, from time to time, she has retained Julia Taylor, a lawyer with nine years' experience, for $75 per hour, and Tom Evans, with 20 years' experience, for $125 per hour. Decl. of Elizabeth Barrett-Anderson re Pls.' *Application for Att'ys Fees and Costs* (Barrett-Anderson Decl.), CR 288, at 2.

A declaration was also submitted by Linda Ingles, a lawyer unrelated to any of the parties. As of February 1991, Ingles had been in private practice in Guam for nine years, prior to which she served as a law clerk for the Superior Court of Guam and worked for the Public Defender Service Corporation for approximately two and one-half years, totaling more than 12 years' experience. Ingles charges $150 per hour for normal litigation work. Ingles, like Arriola, has been involved in class action litigation, specifically litigation involving damages from asbestos. Ingles also notes that, on occasion, she retains another lawyer, Ruth Hall, "who specializes in appellate work and legal writing." Hall has been on island since 1977; she served as a law clerk to Judge Weeks and worked for the public defender before entering private practice. "She is considered one of the best legal writers on Guam having had extensive experience in trial and appellate

briefing," Ingles tells us. Hall's hourly rate at all relevant times: $100 per hour. Decl. of Linda Ingles re Pls.' Applic. for Att'y's Fees and Costs, CR 289.

The record thus shows that lawyers of Arriola's experience--and some with more experience--bill at $150 per hour or less, sometimes considerably less. Arriola herself billed her paying clients $120 as an associate; even as a partner, she charges only $160. Supp. Decl. at 1. How then does the district court justify an hourly rate of $175? By noting that this case was brought as a class action and "there is no other attorney on Guam who possesses Ms. Arriola's combination of skill and experience in handling class action civil rights lawsuits of this size and complexity." First Fee Award at 20.

The majority does not rely on this justification, and for a good reason: It makes no sense in the context of this case. It is true that the case was brought as a class action, but it could just as well have been brought as an individual action. The relief obtained--invalidation of the Guam abortion statute--would have been precisely the same. Indeed, *712 counsel spent less than 14 hours on the class action aspect of the case, largely in drafting the class allegations in the complaint and preparing a motion to dispense with class notice. First Fee Applic., Ex. C.

In the end, what qualifies a lawyer for an enhanced fee award is the kind of job she does with the case before her. To merit an enhanced hourly fee--a fee larger than she and her contemporaries generally charge their clients--a lawyer must have handled the case with great expertise or great dispatch or obtained unexpected results. These are factors that neither the district court nor the majority consider. As discussed above, see pages 711-12 supra, when these factors are considered, there is nothing in the record that justifies an

hourly rate above $150, the top rate charged by lawyers of Arriola's experience.[29]

**The Multiplier**

To begin with, I disagree with my colleagues that Dague ever permits a multiplier in these circumstances. Dague held that it is improper to enhance the lodestar amount under an ordinary fee-shifting statute because payment to the lawyer is contingent. 505 U.S. at 567, 112 S.Ct. at 2643- 44. Such an enhancement "would likely duplicate in substantial part factors already subsumed in the lodestar." Id. at 562, 112 S.Ct. at 2641. In explaining its conclusion, the Court noted that, to the extent the risk of nonpayment reflects the difficulty of establishing the merits, it "is ordinarily reflected in the lodestar--either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." Id. (citation omitted). "Taking account of [this factor] again through lodestar enhancement," the Court noted, "amounts to double-counting." Id. (citation omitted).

As I read this passage in Dague, any factor that is necessarily included in the calculation of the lodestar cannot also be the basis for an enhancement. Indeed, Dague went farther; it held that even factors excluded from the lodestar calculation do not always provide a basis for enhancement. Id. at 566-67, 112 S.Ct. at 2643-44. According to the district court, its reasons for granting the enhancement were as follows: (a) the

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[29]. Twenty five dollars an hour may not seem like a lot, but given the excessive hours billed by Arriola (848.65), Second Fee Applic., this comes to $21,216.25. If we then consider that the district court approved (and the majority affirms) a multiplier, this is doubled to $42,432.50. As Senator Dirksen is said to have said: "Pretty soon you're talking about real money."

case was so difficult or unusual that there were no other lawyers on Guam competent to handle it; (b) the case was so undesirable because of its controversial subject matter that no other lawyers would have been daring enough to handle it; and (c) counsel was precluded from other employment because this litigation took up all of her productive time. First Fee Award at 20.[30]

Each of these factors is already taken into account in calculating the lodestar. The first two factors--that there supposedly were no other lawyers who would or could have taken the case because of its great difficulty, or because of the undesirability of the subject *713 matter--are naturally reflected in what a lawyer charges in taking a case. At equal

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[30] The majority disputes that the district court justified the enhanced fees, in part, because it believed Guam is lacking in lawyers with the necessary skills. Maj. op. at 697 & n. 4. Here is what the district court said: "To the best of the Court's knowledge ... there is no other attorney on Guam who possesses Ms. Arriola's combination of skill and experience in handling class action civil rights lawsuits of this size and complexity." First Fee Award at 20. Again: "Ms. Arriola ... was uniquely qualified on Guam to spearhead this effort as lead local counsel." First Fee Award at 9-10. And again: "[T]he more important considerations [in justifying the rate enhancement and multiplier] were ... the rare and exceptional nature of the case, particularly in the small island community of Guam." Second Fee Award at 6. And yet again: "[T]he Court ... specifically finds that by awarding [the ACLU] attorneys the prevailing market rate in the legal community in which they are based [New York City], other, similarly skilled attorneys will be induced to take their skills where they are needed but not readily available." First Fee Award at 12.

The majority also disputes that the district court enhanced the award in part because Arriola was precluded from other employment. Maj. op. at 697 & n. 4. Wrong again: "The Court is further persuaded that Ms. Arriola undoubtedly was precluded from other employment when she accepted this case. As documented above, she spent many, many hours seeing it through to its conclusion." First Fee Award at 20.

hourly rates, lawyers will choose cases that are easier or have more interesting subject matter; clients with cases involving more difficult work, or less desirable subjects, have to bid higher for legal services. The third factor--that the lawyer has been precluded from accepting other employment--is also taken into account in calculating the lodestar. Much as some lawyers might prefer it be otherwise, there are only so many hours in the day that can be billed to client work. In deciding whether to accept a new case, a lawyer must consider whether it will keep him from serving other clients. As with any other pricing mechanism, the hourly rate reflects the cost of opportunities foregone.

The majority misreads Dague by considering policy questions such as whether a higher hourly rate would encourage litigation of undesirable cases. Maj. op. at 699. Such considerations may be brought to bear only where the factors in question were not already considered in calculating the lodestar. 505 U.S. at 562, 112 S.Ct. at 2641. Because all the factors on which the district court relied were normal market factors that go into calculating the lodestar, they cannot form the basis of an enhancement under Dague. There is thus no room for us to make policy judgments.

Even were an enhancement based on such factors permitted, there are no grounds for an enhancement here. While I do not question the district court's statement that factors other than contingency played a role in its original decision granting the enhanced hourly rate and the multiplier, the fact remains that contingency was at the very heart of the fee applications and the affidavits supporting it.[31] Read

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[31] In her first fee application Arriola claims that "because of the substantial risk, my firm and similar firms will generally not accept [contingent] cases unless the anticipated fee ... will be equal to at least two

ing these materials, I find it hard to believe that contingency did not play a dispositive role in the district court's initial decision setting the rate and granting the multiplier.[32] I don't

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to three times the value of the firm's services billed at the prevailing rate." First Fee Applic. at 18. According to Simon Heller, "The ACLU accepted its status in this case as co-counsel with Ms. Arriola on a contingency basis; without the possibility of recouping attorneys' fees ... the ACLU, which depends on contributions and grants for its operation ... would probably not have taken this case." Heller Decl. at 5 (emphasis added). (One must wonder at counsel's statement. The suggestion that the National ACLU's Reproductive Freedom Project would stay out of a case involving a statute that undermines the very foundations of *Roe v. Wade* strikes me as incredible. Indeed, counsel's assertion is quite inconsistent with the venerable practice of the ACLU, which is to defend personal liberties regardless of a client's ability to pay or the availability of other compensation. As the district court observed: "The Reproductive Freedom Project exists to participate in this type of case and needs no inducement, such as the prospect of an enhanced fee upon a successful conclusion to the case, to become involved." First Fee Award at 17. But I digress.)

> There's much more of the same: "[L]ocal firms would be unlikely to accept a case such as GSOBGYN unless the anticipated fee, if successful, would be greater than the value of the firm's services billed at the prevailing hourly rate," stated J. Bradley Klemm; "[s]uch an award makes contingent civil rights class action cases competitive with non-contingent cases...." Decl. of J. Bradley Klemm (Klemm Decl.), CR 260, at 5. "Because of the inherent uncertainties [in contingency cases] the recovery for an attorney should be at least three times that expected on an hourly basis." Decl. of James S. Brooks (Brooks Decl.), CR 261, at 2.

[32] The district court's original explanation of the fee award states: "Each attorney still faces the prospect of no recovery of fees or costs." First Fee Award at 10. And: "The results obtained were exactly what they sought, but [the ACLU] still face[s] the possibility of recovering neither [its] fees nor [its] costs." Id. at 12. And further:

Plaintiffs presented affidavits from local attorneys that indicate that contingent fee cases are not accepted on Guam unless the attorney or firm calculates that a successful lawsuit will recover an amount two to three times greater than would be billed a paying client for the same case. See,

understand, then, *714 how the enhancement can remain the same when this substantial factor is deleted. It seems odd to say that three plus one equals four, but then four minus three still equals four.

But let's assume that the contingency fee played no role at all in the district court's decision, and let's look at the other factors advanced in support of the multiplier. Essentially, the court found that there were no lawyers on Guam as competent as Arriola to handle to case, and that no other lawyers would have had the courage to do so. The court errs on both counts.[33]

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generally, Declarations of J. Bradley Klemm, James S. Brooks, and G. Patrick Civille, filed November 15, 1990. Mr. Klemm, in particular, averred that he could not remember in his 17 years of practice on Guam even one class action civil rights case of this magnitude. Id. at 3. He further stated that "such lawsuits are unappealing to firms on Guam due to their complexity, their [un]usually controversial and undesirable nature, and the lack of a history of such litigation on the island." Id. He also expressed his belief that "lawyers and law firms on Guam are reluctant to take plaintiff class action civil rights cases because they take too many years to resolve, are too expensive to litigate, and tie up a firm's resources for long periods of time.["] Id. at 4.

Plaintiffs' counsel stated that the prospect of an upward adjustment of fees due to the risk inherent in contingent fee cases was a critical inducement in their decision to accept the case. See Declarations of Anita P. Arriola and Simon Heller, filed November 15, 1990.

Id. at 17-18. And still further: "[T]his multiplier reflects the difference in Guam's market treatment of contingent fee cases as a class, rather than the 'riskiness' of this particular case." Id. at 21.

[33] As noted, the district court also mentioned the fact that plaintiffs were precluded from other employment as a basis for granting a multiplier. First Fee Award at 20. Even if this were a proper ground for an enhancement, there is no evidence of this in the record. Arriola's declaration mentions not a single client her firm was required to turn away because of this case.

**No Other Lawyer Competent to Handle the Case**

Insofar as the district court based its finding on the absence of other local counsel competent to handle the case, it was clearly mistaken. Experience shows there are plenty of lawyers in Guam and Saipan who could have handled this case. This remote corner of our circuit regularly gives rise to sophisticated litigation involving difficult legal questions on a wide variety of subjects. One of the most difficult legal issues I have dealt with, for example, was raised in Ngiraingas v. Sanchez, 858 F.2d 1368 (9th Cir.1988), a case out of Guam that eventually was resolved by the Supreme Court, 495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). Ngiraingas was ably handled in the district court, our court, and the Supreme Court by island counsel Jeffrey R. Siegel. Ngiraingas is not unique, not by a long shot. Attached as Appendix B is a list of some of the lawyers from Guam and Saipan who, according to published reports, have handled complicated cases in the federal courts. Any of these lawyers--and probably many others--would have been perfectly capable of handling this case.

Would any of them have been willing to challenge Guam's abortion statute? There's no way of knowing, as none of them was asked. See p. 716 *infra*.[34] But to say, as did the district court, that "there is no other attorney on Guam who possesses Ms. Arriola's combination of skill and experience," First Fee Award at 20, is just not true.

**No Other Lawyer Courageous Enough to Handle the Case**

The district court's second justification for the award of a multiplier was the "extreme undesirability" of the case,

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[34] From what we know of the views held by island counsel on the issue of abortion, however, they are largely pro-choice. See note 37 infra.

Second Fee Award at 6, arising from the fact that "Guam is a relatively small and predominantly Catholic community and ... this lawsuit was particularly emotionally charged." First Fee Award at 19. The court also noted that Arriola received death threats during the course of the litigation, "encountered overt hostility from members of the community," id., and that, "even with the prospect of a multiplier of two, Guam attorneys asked to represent similarly unpopular plaintiffs in similarly unpopular cases will be extremely reluctant to undertake representation." Second Fee Award at 7. The majority approves, but do these reasons make sense? Are they supported by the record? Are they fair to the people and lawyers of Guam? I think not.

The district court's order paints a picture of an island community where the public is virtually of one mind on the question of abortion, and where all dissent on the issue is quickly stifled. See First Fee Award at 19-20. The district judge cites no evidence for this, just his own personal belief. See Second Fee Award at 7. A review of the record--to say nothing of simple common sense--contradicts the district court's assessment. *715 As the following items illustrate, opinion in Guam as to both the legality and the wisdom of the abortion statute was mixed; many individuals and public officials opposed the law:

> The Guam Nurses Association (GNA), consisting of approximately 90 nurses on Guam, Decl. of Rita Lujan Bevacqua, CR 116, at 1, joined in this lawsuit as a party plaintiff without any registered dissent among its members, Br. of Appellees at 30.
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> * The Guam Society of Obstetricians and Gynecologists, consisting of obstetricians and gynecologists on the island, Decl. of Dr. Edmund A. Griley, M.D.,

CR 116, at 1, joined as party plaintiffs in the lawsuit, also apparently without dissent.

* In addition to the representatives of the plaintiffs, no fewer than 15 individuals living on island--several of them Guam government employees--filed declarations supporting plaintiffs' summary judgment motion. See Decls. of Kirk Bellis; Rev. Dr. David K. Corbin; Evangelista Doe; Manuela Doe; Brindha Muniappan; Cynthia Naval; Carol O'Donnell; Beverly Olson, R.N.; Robert F. Rogers, Ph.D.; Patricia Stahlnecker, R.N.; Linda Stark; Donald H. Rubinstein; Marilyn Wingfield; Ann Workman; and Randall L. Workman, CR 116.

* According to plaintiffs, 500 to 1,000 abortions are performed on Guam every year, Decls. of John S. Dunlop, M.D.; Edmund A. Griley, M.D.; abortions are accepted as part of Guamanian culture and have been for centuries, Decls. of Donald Rubinstein; Dr. Laura Thompson; Ann Workman; Randall L. Workman, CR 116; abortion can be reconciled with some Roman Catholic viewpoints, Decl. of Daniel C. Maguire, CR 116.

* A scientifically conducted survey of Guamanians taken in late April and early May of 1990 concluded that a plurality (40.6 percent) opposed the abortion law; only 38.1 percent supported the law. Decl. of Robert F. Rogers, Ph.D., CR 116, Ex. A.

* In a poll taken in March 1990 by a cable television company, 77 percent of those contacted said they would vote to rescind the abortion statute. Guam Judge Suspends Restrictive Abortion Law, UPI, Mar. 26, 1990, available in LEXIS, NEWS Library, ARCNWS File.

No doubt some denizens of Guam--perhaps a great many--feel strongly that abortion should be illegal. But there are strong views for and against abortion throughout the United States. Is there anything in the record supporting the view that Guamanians are less capable of civil disagreement on this issue than other U.S. citizens? Based on nothing more than the district court's personal assessment, would we uphold a similar "finding" as to the people of Los Angeles, or of Phoenix, or of the District of Oregon? Surely not. The people of Guam are entitled to no less respect.

But let's assume, contrary to fact, that Guamanians were uniformly opposed to abortion. Let's assume also that the political tides strongly favored the abortion law and that any lawyer who brought a case opposing the legislation would be subject to social and political pressure. What evidence is there that lawyers on Guam and Saipan would fail to rise to the occasion--that they would turn away clients wishing to challenge a patently unconstitutional law passed by their legislature?

Long-standing tradition imposes upon lawyers a responsibility to take on unpopular causes--even causes the lawyer personally opposes--in order to vindicate the legal rights of fellow citizens.[35] A few examples in the margin will suffice,

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[35] See, e.g., Jehanne Henry, Defending the Indefensible: An L.A. Lawyer Is Shunned for Taking on Radovan Karadzic as a Client, Calif. Lawyer, Oct. 1996, at 16 (describing work by Los Angeles lawyer and former federal prosecutor Edward M. Medvene on behalf of alleged Bosnian Serb war criminal); id. (quoting former Attorney General Ramsey Clark, who is representing Karadzic in a civil suit, as stating: "If you believe in rights, you defend them.").

but no doubt we can all come up with scores of others.[36] Are the *716 lawyers of Guam and Saipan unworthy of this noble tradition? Can we really agree with the district court that "even with the prospect of a multiplier of two, Guam attorneys asked to represent similarly unpopular plaintiffs in similarly unpopular cases will be extremely reluctant to undertake representation"? Second Fee Award at 7.

All evidence is to the contrary. June S. Mair, Senator Arriola's legal counsel, advised her boss bluntly of the proposed law's likely unconstitutionality. Mair Dep. at 23. Attorney General Barrett-Anderson spoke with equal candor in a written opinion whose effect could only have been to

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[36] Michael Tigar, Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir.1993) (fighting extradition of alleged Nazi war criminal); Walter H. Pollak, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (defending black men against charges of raping two white women); Sarah Weddington, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Stephen Jones, see George Lane, "McVeigh Team Says John Doe 2 Still Sought," Denver Post, May 3, 1996, at B4 (defending Timothy McVeigh against charges of bombing the Murrah Federal Building in Oklahoma City); Lynne Stewart, see "Sheik and Nine Others Convicted in Bomb Plot," Baltimore Sun, Oct. 2, 1995, at 1A (defending Sheik Abdel Rahman against charges of masterminding the plot to bomb the World Trade Center); William M. Kunstler, Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (defending Johnson against charges of flag desecration); Yoram Sheftel, see "Vilified Defender of the Faith," Financial Times, May 28, 1994, at 22 (defending John Demjanjuk in Israeli courts against charges of mass murdering Jews at Treblinka); Jonathan Goldberg, see Ann Shoket, Defense Against All Odds, Am. Law., Apr. 1996, at 35 (defending Yigal Amir against charges of assassinating Yitzhak Rabin); Mikhail Wladimiroff, see William W. Horne, For the Record: Mikhail Wladimiroff, Am. Law., Apr. 1996, at 71 (defending Dusko Tadic in the International Criminal Tribunal for Bosnian war crimes); Jacques Verges, see Frederick Painton, A Verdict on the Butcher, Time, Jul. 13, 1987, at 40 (defending Klaus Barbie against charges of crimes against humanity).

derail the proposed legislation, see App. A, and which earned her the disapproval of Senator Arriola, Mair Dep. at 34. Guam's chief of police cautioned his force to use restraint in making arrests under the new law. Sgambelluri Dep. at 45, 51. Although the governor signed the legislation, he declared himself torn on the issue and expressed his preference for a narrower statute. Ada Dep., Ex. 2 at 1, 3. Various officials and employees of the Guam government submitted affidavits in support of plaintiffs' contentions, presumably exercising their ethical responsibilities to their respective professions. See Decl. of Kirk Bellis (Staff Psychiatrist, Guam Dept. of Mental Health); Cynthia Naval (Planner, Guam Dept. of Commerce); Beverly J. Olson, R.N. (Assistant Professor, University of Guam); Robert F. Rogers, Ph.D. (Professor, University of Guam); Patricia Stahlnecker, R.N. (School Health Counselor, Oceanview High School); Donald H. Rubinstein (Associate Professor, University of Guam); Marilyn Wingfield (Director, Guam Dept. of Mental Health), CR 116. Several lawyers submitted affidavits in support of plaintiffs' fee petition. See pp. 716-17 infra.

In light of this evidence that professionals on Guam, just as elsewhere, are willing and able to live up to their responsibilities, what supports the district court's finding that Guam lawyers must be shown a golden carrot before they will take on unpopular cases? Remarkably little. To begin with, there is no evidence that any lawyers on Guam or Saipan were asked to handle the case and turned it down--not for reasons of undesirability, not out of moral scruples, not out of a concern that they might be in over their heads. Neither Anita Arriola nor Joaquin Arriola discuss this point in their declarations, focusing, rather, on the contingent nature of the litigation as a basis for seeking an enhancement. Decl. of Joaquin C. Arriola in Supp. of Pls.' Application for Att'ys Fees and Costs at 3-5, CR 263. Arriola's partner, Mark E.

Cowan, expresses the view that, had Arriola been unwilling to take the case, "it is probable that such responsibility would have been assumed by a stateside based firm." Decl. of Mark E. Cowan in Supp. of Pls.' Application for Att'ys Fees and Costs, CR 264, at 3. However, he bases his speculation only on the perceived lack of competence of other island counsel, not on the undesirability of the case. Id.

Three other lawyers submitted declarations in support of the fee application, all of them stressing that this was a complex class-action civil rights case and the recovery was contingent. One of the attorneys, G. Patrick Civille, says nothing about undesirability. Decl. of Patrick G. Civille, CR 259. James S. *717 Brooks points to the hostility Arriola encountered and argues that she is entitled to larger fees because of her firm's tarnished image and the personal hardship she endured. Decl. of James S. Brooks at 4, CR 260. I discuss this point below, but what is significant here is that Brooks says not a word about the unwillingness of other lawyers to handle the case under these circumstances.

Finally, there is the declaration of J. Bradley Klemm, which the district court cites. See First Fee Award at 17. Klemm makes a number of assertions in his declaration--about the difficulty of the case, about possible conflicts of interest on the island, about the risk of nonpayment. In addition, his declaration also contains the following two sentences: "Guam is a small island and is predominantly Catholic. Based on my experience and belief, many lawyers on Guam would not have accepted this case because of the position of the leadership of the Catholic Church on Guam on this issue." Decl. of J. Bradley Klemm in Support of Pls. Application for Att'ys Fees and Costs, CR 260, at 3. This is the only item in the record that even remotely supports the district court's finding that Guam lawyers would have had qualms about taking plaintiffs'

case. And what exactly does Klemm say? Not that all lawyers on Guam and Saipan would have been unwilling to do so; not that most lawyers would have been unwilling; not that he knows even a single lawyer who would have refused the case on moral grounds; not even that he himself would have done so. Klemm merely expresses his personal belief, unsupported by any facts, that many lawyers would have been unwilling to handle the case. Does "many" mean five? Does it mean 10? Does it mean 25 percent of the bar? Does it mean 50 percent? Of course there's no way of knowing. Klemm, a careful attorney who is well-acquainted with his duty of candor, has made a statement that is so vague it can't be refuted. The Klemm Declaration lends little if any support to the district court's "finding" that Guamanian lawyers en masse were too intimidated to handle the case.[37]

There is, finally, the fact that Arriola suffered some form of vilification, including possibly a death threat, apparently in connection with her handling of the case. What bearing can this have on the fee question? Section 1988 is not a workers' compensation statute for lawyers; it's a means whereby a prevailing party can recover amounts it reasonably spends on a lawyer. Counsel, in turn, is paid for the services she renders, not the inconvenience or harm that happen to befall her as a result. Had these threats and vilifications occurred before counsel undertook the representation, this might have affected the hourly rate at which she and other lawyers would have been willing to take the case. But, coming after the

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[37] The only evidence in the record that anybody had difficulty getting a lawyer involved defendant Leticia V. Espaldon. According to Attorney General Barrett-Anderson, "It was extremely difficult to find any attorney on Guam willing to [represent Espaldon] primarily because of their personal beliefs[.] Patrick Wolff was finally persuaded to represent [her] due in part to their family ties." Barrett-Anderson Decl. at 2.

litigation was underway, they could have had no bearing on the fee for which Arriola agreed to work.

And, while we're considering just how "undesirable" this case supposedly was, it strikes me as terribly one-sided to disregard the collateral advantages that inured to Arriola and her firm as a result of the litigation. To begin with, every lawyer and every firm enjoys a victory, particularly a victory against the established order; by that standard, this was a doozy. I rather doubt that Arriola and her firm conceal their participation when they engage in what is gingerly referred to as "client development." See Planned Parenthood of Cent. & N. Arizona v. State of Arizona, 789 F.2d 1348, 1354 (9th Cir.1986) ( "Controversial representation is just as likely to bolster the reputation of a law firm as it is to harm it.").[38]

***718** Moreover, the cause here was one to which Arriola was not indifferent. She testified against the pending legislation and then sounded the alarm by alerting the ACLU that the Guam legislature was about to pass the country's most restrictive abortion statute. See Gross, note 5 supra. How many lawyers toiling in law firms across the country would not gladly give up their Lucite cubes and power lunches for a chance to lead the battle to preserve a fundamental right under attack? And how many spend their entire careers without once savoring a decisive victory in a cause they hold near and dear? The simple reality--the reality written all over

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[38] These days, even losing a big case--particularly one that "could not be lost"--can enhance a lawyer's reputation: "[Marcia] Clark, the defeated deputy district attorney, has emerged as the [O.J. Simpson] trial's biggest winner, racking up a $4.2 million book deal, a string of speaking engagements for a fee of up to $22,000 apiece, and the sort of celebrity and public adulation normally accorded superstar actors and athletes." Thomas Fields-Meyer et al., O.K. After O.J., People, Mar. 18, 1996, at 84. Go figure.

this record--is that Arriola did not have to be coaxed into this case by fat fees; she did not have to overcome fears for her safety, or concerns about the difficulty of the case, or anything else. This is a torch she wanted to carry. She found the right clients, she contacted the national ACLU for support, she brought a lawsuit and managed to knock out a piece of legislation she considered anathema.

This is all to her credit. It is precisely what one would hope and expect lawyers will do when personal liberties come under attack in their communities. But if we are going to take into account such nebulous factors as the desirability or undesirability of the case, we must consider both sides of the coin. Despite their protestations, see note 31 supra, Arriola and the ACLU did not need to be lured into this lawsuit--they jumped in with both feet. Surely there were many lawyers on Guam and Saipan who would have been willing and able to take Arriola's place.[39] Any contrary finding by the district court flies in the teeth of the record.

I would affirm the interim fee award; not a penny more.

**APPENDIX A**

Guam Attorney General's opinion letter predicting unconstitutionality of legislation that became Guam abortion statute.

(SEAL)

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[39] The majority is apparently persuaded by the fact that "none of these [other] lawyers came forward to say they would have taken this case." Maj. op. at 697 n. 4. It's not exactly clear to me how or why they would have done this. Last I heard it is still an ethical lapse for a lawyer to try to offer his services to a client represented by another lawyer.

* * *

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February 26, 1990

Senator Pilar C. Lujan
Chairwoman, Committee on Judiciary and Criminal Justice
Twentieth Guam Legislature
Agana, Guam 96910
Re: Bills # 848 and # 842

Dear Madam Chairwoman and Members of the Committee:

On September 16, 1989 a public hearing was held on Bill # 848, an act to ban abortions on Guam, and Bill # 842, an act to limit abortions to instances of rape and incest. Although our office was not able to prepare testimony in concert with the Governor's office in time for the public hearing, having received notice on September 14th, we respectfully request the Committee's acceptance of our written testimony on these important bills.

We all are acutely aware of the highly sensitive and volatile nature of the national public debate surrounding the question of legalized abortions. The controversy has raged unabated for years and recently intensified because of the U.S. Supreme Court's recent decision in Webster v. Repro-

ductive Health Services. The apparently irreconcilable views expressed by "pro-life" and "pro-choice" advocates are so emotionally charged there is scant room for compromise.

*719 It is recognized that reasonable persons can and do hold unalterably opposed opinions about legal abortions, and we fully appreciate the fact that some of those subjective personal opinions stem from religious beliefs, moral attitudes and ethical considerations. However, it is the duty of the Attorney General to examine and evaluate the proposed legislation in light of the existing law of the land, and to give you an objective legal opinion as to whether or not the bills before you can pass constitutional muster. In that regard, it's necessary to review and discuss the relevant court decisions on the subject.

Our review of Bills # 848 and # 842 focus solely on an interpretation of constitutionality. It is my opinion that Bills # 848 and # 842 are unconstitutional as violative of a woman's constitutional right of privacy as enunciated by the United States Supreme Court's 1973 decision in Roe v. Wade, 93 S.Ct. 705, 410 U.S. 113 [35 L.Ed.2d 147] (1973). The Court stated:

> "This right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent ... We therefore, conclude that the right of personal privacy includes the abortion decision ..." (410 U.S. 155 [153-54, 93 S.Ct. 727])

The right of a woman to choose to terminate her pregnancy is protected under this right of privacy. Under such guarantee no state may interfere with or regulate during the first

trimester of pregnancy an attending physician's decision that the patient's pregnancy should be terminated. Further no state may regulate the abortion procedure during the second trimester of pregnancy except to the extent that the regulation is intended to protect and preserve the health of the mother or fetus. Under the Fourteenth Amendment to the United States Constitution, a state statute which proscribes all abortions after the point where a fetus has become viable, except those abortions necessary to preserve the life or health of the mother, is permissible.

The Court's ruling in Webster v. Reproductive Health Services, et al. (492 U.S. 490) 109 S.Ct. 3040 (106 L.Ed.2d 410) has not disturbed the basic premise of Roe. In Webster the Court merely allowed states to determine whether abortions should be performed in public facilities, at public expense. The Court did nothing by way of overruling its position in Roe.

Prohibiting abortions entirely would violate the above discussed constitutional guarantees. Prohibiting abortions except in instances of pregnancies resulting from rape and incest would likewise violate the same principles. A state cannot interfere with a woman's right of personal privacy to decide to have an abortion whatever the cause of her pregnancy. The state may regulate such a decision, but it cannot deprive a woman of such a choice. Bills # 848 and # 842 would take away a woman's right to decide (usually upon consultation with her physician) to have an abortion.

In addition to those basic constitutional defects in Bill # 842, Section 4 of the bill creates further constitutional problems. Parental consent regulations have uniformly been struck down in a majority of states as unconstitutional where it attempts to broadly prohibit a minor from obtaining an abortion. (Coe v. Gerstein, 376 F.Supp. 695; *Gary-Northwest*

*Indiana Women's Services v. Bowen*, 421 F.Supp. 734; *Ballard v. Anderson*, 4 Cal.3d 873, 95 C[al.]R[ptr.] 1 [484 P.2d 1345].) However, some parental consent statutes have been upheld as constitutional where the state attempts to provide alternative procedures whereby a minor could demonstrate her maturity to make an abortion decision. (*Zbarez [Zbaraz] v. Hartigan*, 763 F.2d 1532; *Re Moe*, [18 Mass.App.Ct. 727] 469 N.E.2d 1312; *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283.) It should be noted that the U.S. Supreme Court this term has decided to hear the consent issue on abortions for minor girls.

The Federal Constitution, as interpreted by the U.S. Supreme Court, guarantees to every woman the right to decide whether or not to have an abortion. No state can take that decision away except by regulation ***720** which is intended to promote compelling state interests in protecting the health of its citizens. Bills # 842 and # 848 attempt not to regulate, but to proscribe. For this reason we believe that both bills would be held unconstitutional. Sincerely,

/s/

ELIZABETH BARRETT-ANDERSON

cc: Governor

All Committee Members

APPENDIX B

Some attorneys practicing on Guam and Saipan (Commonwealth of the Northern Marianas or CNMI) when the case was filed. Years of experience at that time, insofar as can be determined from published sources, in parentheses.

**Marybeth Herald, Saipan** (14): *Wabol v. Villacrusis*, 908 F.2d 411 (9th Cir.), as amended, 958 F.2d 1450 (9th Cir.1990)

(Equal Protection Clause does not apply to race-based restrictions on long term alienation of CNMI land), cert. denied, 506 U.S. 1027, 113 S.Ct. 675, 121 L.Ed.2d 598 (1992); *Aldan-Pierce v. Mafnas*, 31 F.3d 756 (9th Cir.1994) (clarifying the jurisdiction of CNMI courts after the Commonwealth Judicial Reorganization Act of 1989), *cert. denied*, 513 U.S. 1116, 115 S.Ct. 913, 130 L.Ed.2d 794 (1995).

**Theodore R. Mitchell, Saipan** (30): *Wabol v. Villacrusis*, 908 F.2d 411 (9th Cir.), as amended, 958 F.2d 1450 (9th Cir.1990), *cert. denied*, 506 U.S. 1027, 113 S.Ct. 675, 121 L.Ed.2d 598 (1992); *Aldan-Pierce v. Mafnas*, 31 F.3d 756 (9th Cir.1994), *cert. denied*, 513 U.S. 1116, 115 S.Ct. 913, 130 L.Ed.2d 794 (1995); *Marianas Public Land Trust v. Government of Northern Mariana Islands*, 838 F.2d 341 (9th Cir.1988) (monies held in joint account by United States and CNMI pursuant to land acquisition agreement were not "proceeds of the Public Lands" within the meaning of the CNMI constitution); *Ferreira v. Borja*, 1 F.3d 960 (9th Cir.1993) (CNMI Supreme Court had, in substance, attempted to "deprive a person a property interest through the expedient of an untenable judicial interpretation of local law that denies that a property interest ever existed").

**Jay H. Sorensen, Saipan**: *Yokeno v. Mafnas*, 973 F.2d 803 (9th Cir.1992) (district court erred in concluding that it need not determine whether federal anti-collusion statute barred exercise of diversity jurisdiction).

**Howard Trapp, Guam** (36): *Territory of Guam v. Olsen*, 431 U.S. 195, 97 S.Ct. 1774, 52 L.Ed.2d 250 (1977) (Guam Legislature violated the 1950 Organic Act of Guam when it divested federal district court of appellate jurisdiction over cases from Guam and transferred it to newly created Guam Supreme Court); *United States v. Perez*, 67 F.3d 1371 (1995) (failure to instruct jury on essential element of crime cannot

be harmless error), *reh'g en banc* granted, 77 F.3d 1210 (1996);* *Chase Manhattan Bank v. Gems-by-Gordon*, 649 F.2d 710 (1981) (negative pledge agreement could not be enforced as equitable mortgage where that was not parties' intent); *Awa v. Guam Memorial Hospital Authority*, 726 F.2d 594 (9th Cir.1984) (Guam statute's screening and arbitration requirement for medical malpractice suits was inconsistent with statute's right to trial by jury, rendering these provisions unenforceable as written); *People of Territory of Guam v. Villacrusis*, 992 F.2d 886 (9th Cir.1993) (federal Comprehensive Drug Abuse Prevention and Control Act of 1970 did not preempt Guam law against importing controlled substances); *People of the Territory of Guam v. Marquez*, 963 F.2d 1311 (9th Cir.1992) (failure to instruct jury orally on elements of offense was structural error compelling automatic reversal); *Nelson v. Ada*, 878 F.2d 277 (9th Cir.1989) (1986 Amendment to Guam's Organic Act did not ratify 1977 Guam statute that was invalid under the pre-Amendment Organic Act); *United States v. Bordallo*, 857 F.2d 519, (9th Cir.1988), as amended on *reh'g*, 872 F.2d 334 (9th Cir.) (Guam was not a "State" for purposes of federal statute prohibiting State employees from accepting *721 kickbacks), *cert. denied*, 493 U.S. 818, 110 S.Ct. 71, 107 L.Ed.2d 38 (1989); *People of the Territory of Guam v. Yang*, 850 F.2d 507 (9th Cir.1988) (*en banc*) (Ninth Circuit reviews de novo the interpretation of local law by the Appellate Division of the District Court of Guam, and that the latter may not rely on unpublished Ninth Circuit decisions); *United States v. Leon Guerrero*, 847 F.2d 1363 (9th Cir.1988) (interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render the

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*The majority may remember Mr. Trapp. He appeared before this panel in the principal case; his client's conviction was partially reversed and partially affirmed. *Perez*, 67 F.3d at 1386.

suspect's subsequent statement involuntary); *Cruz v. Abbate*, 812 F.2d 571 (9th Cir.1987) (Appellate Division of the District Court of Guam has power to issue writs of mandamus under the All Writs Act); *People of the Territory of Guam v. Quinata*, 785 F.2d 812 (9th Cir.1986) (filing of juvenile court petition commenced criminal proceedings for statute of limitations purposes); *People of the Territory of Guam v. Mafnas*, 721 F.2d 683 (9th Cir.1983) (order denying motion to suppress was not a final decision for appealability purposes); *People of the Territory of Guam v. Okada*, 694 F.2d 565 (9th Cir.1982) (Guam legislature had no power under the Organic Act of 1950 to authorize government appeals from the District Court of Guam in criminal cases), as amended, 715 F.2d 1347 (1983), *cert. denied*, 469 U.S. 1021, 105 S.Ct. 441, 83 L.Ed.2d 367 (1984); *Jones & Guerrero Co. v. Sealift Pac.*, 650 F.2d 1072 (9th Cir.1981) (District Court of Guam had jurisdiction under F.R.C.P. 60(b) to set aside a previous order dismissing the action); *United States v. Santos*, 623 F.2d 75 (9th Cir.1980) (1958 amendment to 48 U.S.C. § 1424(a) did not deprive District Court of Guam of jurisdiction to hear criminal cases).

**John A. Spade, Guam** (17): *Casualty Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596 (9th Cir.1992) (letters defaming a Guam-based corporation in Indiana were insufficient to create minimum contacts for in personam jurisdiction).

**David A. Mair, Guam** (15): *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir.1985) (government retirement benefit plan distinguishing between native Guamanians and immigrants violated equal protection), *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986); *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234 (9th Cir. 1989) (shipowner must file petition under Limited Liability Act within six months of first claim).

**Jesus U. Torres, Guam** (34): *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir.1985), *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986).

**Thomas C. Sterling, Guam** (18): *Gioda v. Saipan Stevedoring Co.*, 855 F.2d 625 (9th Cir.1988) (statute limiting appellate jurisdiction of District Court for District of Northern Mariana Islands was inapplicable to case pending at trial when statute enacted).

**J. Bradley Klemm, Guam** (30): *Laguana v. Guam Visitors Bureau*, 725 F.2d 519 (9th Cir.1984) (Bureau employee was not a public employee protected from patronage dismissals); *Holmes v. Director of Revenue and Taxation, Gov't of Guam*, 827 F.2d 1243 (9th Cir.1987) (loss in CNMI corporation could be deducted for purposes of Guam territorial income tax); *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir.1993) (summary judgment was proper against plaintiffs seeking recovery for exposure to PCB's, where plaintiffs couldn't show they were certain to incur disease or had a significant chance of suffering a latent disease), cert. denied, 510 U.S. 1116, 114 S.Ct. 1064, 127 L.Ed.2d 383 (1994).

**Gary D. Hull, Guam** (21): *Bordallo v. Reyes*, 763 F.2d 1098 (9th Cir.1985) (Guam Visitor's Bureau was a government agency or instrumentality and that legislation regarding Board membership violated Organic Act).

**Richard L. Johnson, Guam** (15): *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir.1989) (Guamanian government entitled to sovereign immunity and hence immune from suit in federal court to resolve title to shipwreck in territorial waters).

**Richard A. Pipes, Guam** (19): *Misch v. Zee Enters.*, 879 F.2d 628 (9th Cir.1989) (Jones Act applies in CNMI); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir.1985) (exclu-

sive franchise agreement didn't violate antitrust laws or equal protection principles), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1457, 89 L.Ed.2d 715 (1986); *Awa v.* ***722** *Guam Memorial Hosp. Auth.*, 726 F.2d 594 (9th Cir.1984).

**John E. Moore, Guam and Saipan** (35): *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir.1993), *cert. denied*, 510 U.S. 1116, 114 S.Ct. 1064, 127 L.Ed.2d 383; *Nelson v. Ada*, 878 F.2d 277 (9th Cir.1989).

**Michael W. Dotts, Saipan** (9): *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749 (9th Cir.1993) (enforcing administrative subpoena mandating release of tax records to Inspector General of the Department of the Interior).

**Randell T. Fennell, Saipan** (18): *Camacho v. Civil Serv. Comm'n*, 666 F.2d 1257 (9th Cir.1982) (provision for appointments to Civil Service Commission violated separation of powers provision of CNMI Constitution).

**Douglas F. Cushnie, Guam and Saipan** (32): *Fleming v. Department of Pub. Safety*, 837 F.2d 401 (9th Cir.) (reversing verdict for police officer in section 1983 action), *cert. denied*, 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988); *Citibank N.A. v. Oxford Properties & Fin.*, 688 F.2d 1259 (9th Cir.1982) (after district court reinstated first claim, it erred in reaching other claims dependent on trial of the first); *Gioda v. Saipan Stevedoring Co.*, 855 F.2d 625 (9th Cir.1988); *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647 (9th Cir.1989) (class action employment discrimination suit involving application of civil rights statutes to trust territory government, private rights of action under Trusteeship Agreement and Trust Territory Code, and United States sovereign immunity), cert. denied, 496 U.S. 925, 110 S.Ct. 2617, 110 L.Ed.2d 638 (1990); *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535 (9th Cir.1994) (anti-tying provisions of Bank Holding

Company Act were not applicable to transaction occurring entirely within Republic of the Marshall Islands).

**Traylor T. Mercer, Guam and Saipan** (22): *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401 (9th Cir.1989) (reversing dismissal of class action employment discrimination suit for lack of notice); *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647 (9th Cir.1989), *cert. denied,* 496 U.S. 925, 110 S.Ct. 2617, 110 L.Ed.2d 638 (1990).

**William M. Fitzgerald, Saipan** (22): *Commonwealth of the Northern Mariana Islands v. Atalig,* 723 F.2d 682 (9th Cir.) (Northern Mariana statutory provisions governing right to jury trial did not violate Sixth or Fourteenth Amendments), *cert. denied*, 467 U.S. 1244, 104 S.Ct. 3518, 82 L.Ed.2d 826 (1984); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied,* 475 U.S. 1081, 106 S.Ct. 1457, 89 L.Ed.2d 715 (1986).

**Paul A. Lawlor, Guam** (22): *Guam Fresh,, Inc. v. Ada* 849 F.2d 436 (9th Cir.1988) (determining whether Guam's laws regarding inspection of imported agricultural products is preempted by the Plant Quarantine Act of 1912).

**David W. Dooley, Guam and Saipan** (20): *Brown v. Civil Serv. Comm'n*, 818 F.2d 706 (9th Cir.1987) (provision of Guam's Organic Act requiring governor to provide adequate public education system doesn't give governor authority over school system exclusive of concurrent legislative authority); *Government of Guam v. Superior Court of Guam,* 998 F.2d 754 (9th Cir.1993) (federal district court had exclusive jurisdiction of issue arising in territorial tax rebate claim).

**Donald C. Williams, Saipan (now in Los Angeles)** (29): *Mafnas v. Superior Court*, 936 F.2d 1068 (9th Cir.1991) (federal question jurisdiction existed to clarify the relationship

between the CNMI and the Appellate Division of the District Court for the Northern Mariana Islands).

**Michael A. White, Saipan** (27): *DeMesa v. Castro*, 844 F.2d 642 (9th Cir.1988) (United States was not entitled to conduct de novo and independent investigation in class action lawsuit by former Filipino citizens seeking certificates of identity as citizens of CNMI).

**G. Patrick Civille, Guam and Saipan** (19): *Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir.1988) (defendant's allegations of fraud and undue influence were not sufficient to set aside judgment on promissory notes).

**Jeffrey R. Siegel, Guam:** *Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir.1988); *United States v. Cruz*, 783 F.2d 1470 (9th Cir.) (entrapment ***723** instruction was proper where it permitted jury to find that later drug sales were independent of alleged initial inducement), *cert. denied*, 476 U.S. 1174, 106 S.Ct. 2902, 90 L.Ed.2d 987 (1986).

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**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS, GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; and JOHN DUNLOP, M.D.; on behalf of themselves and all others similarly situated, and all their women patients,

*Plaintiffs-Appellees,*

v.

JOSEPH F. ADA, in his personal and official capacities, et al.,

*Defendants-Appellants.*

No. 94-15070

D.C. No. CV-90-00013-ARM (District of Guam)

ORDERS

Filed May 19, 1997

Before: Harry Pregerson, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Orders; Dissent by Judge O'Scannlain; Concurrence by Judge Hawkins

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**ORDER**

The Order filed on April 16, 1997 is withdrawn. The panel will redesignate that same Order as being "FOR PUBLICATION" and will file it.

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**ORDER**

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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O'SCANNLAIN, Circuit Judge, with whom KOZINSKI and KLEINFELD, Circuit Judges, join, dissenting from the order rejecting the suggestion for rehearing en banc:

A district court may award the prevailing party in a civil rights action "a reasonable attorney's fee." 42 U.S.C. § 1988. A "reasonable fee" is "reasonable compensation," usually a reasonable rate multiplied by a reasonable number of hours. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). It is not meant to be a "windfall," *Blum v. Stenson*, 465 U.S. 886, 897 (1984), nor is it "economic relief to improve the financial lot of lawyers," *City of Burlington v. Dague*, 505 U.S. 557, 562-63 (1992).

This case called upon the district court to decide whether Guam's ban on abortions was unconstitutional under *Roe v. Wade*—not exactly rocket science. The district judge considered it "the easiest issue that [he'd] ever been confronted with." Plaintiffs' counsel nevertheless claimed that 1,487 billable hours were reasonably necessary to secure this judicial breakthrough. Surprisingly, the district judge agreed, and

awarded counsel $175 for each one of those 1,487 hours. Our divided court affirmed the award, citing statements of Guam attorneys that $175 per hour or more was reasonable given the "magnitude and controversy" of the case and "the considerable hostility the suit engendered in the community."

In my view, this kind of bounty to litigate the self-evident proposition that Guam's ban on abortion violates *Roe* creates perverse incentives for attorneys to run up hours in cases that barely pass the laugh test. As if that were not enough, however, the district court proceeded to *double* the amount, producing a total award of $443,642.56.

We should rehear this case en banc solely on the exceptional importance of remedying such a flagrant abuse of a district court's discretion. Perhaps the more compelling reason to rehear it, however, is to maintain uniformity of decisions. In the Supreme Court's view, one that we are not at liberty to ignore, section 1988 does not authorize such unreasonable and duplicative awards.

The district judge doubled the award on the ground that no other attorney on Guam would have taken the case due to its difficulty and undesirability. He relied on vague declarations submitted by local attorneys that an inflated fee was warranted because local attorneys would not represent plaintiffs due to anti-abortion sentiment on the island. Though the irony of that reliance is almost too much to bear, we need not dwell on it. A district court simply cannot use the difficult and controversial nature of a case both to calculate a reasonable fee and then to enhance it. It's called "double counting," and it's not allowed. *Dague*, 505 U.S. at 562-63. The Supreme Court explained in no uncertain terms that a district judge may not enhance the lodestar based on difficulty because difficulty necessarily is reflected in a reasonable hourly rate or a reasonable number of hours. *Blum*, 465 U.S. at 898-99. A district judge likewise may not enhance the lodestar due to undesirability after he inflates the hourly rate to reflect undesirability.

What the district judge did in this case flies straight in the face of what the Supreme Court says judges cannot do. The dissent to our panel's opinion emphasized how the district court "did not conceal its disdain for defendants' arguments." Quite frankly, I cannot tell whether our circuit has rejected the Supreme Court's moratorium on double counting for "controversial" cases or just allowed political correctness to run amok. Either way, I dissent.

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HAWKINS, Circuit Judge, concurring in the order rejecting the suggestion for rehearing en banc:

The Court rejected the en banc suggestion in this matter and for good reason. The appeal concerned the issue of attorney's fees: a matter particularly within the discretion of the district court that heard the case from start to finish. It is not surprising that 1,487 hours were approved by the district court, for some 97% of them were not contested by the opposing parties. The application of the multiplier also brought the hourly rates to a level for which there was ample support in the record. And while some may feel the case did not involve "rocket science," it is well to remember that the underlying litigation occurred after *Webster v. Reproductive Health Services*, 492 U.S. 480 (1990), but before *Planned Parenthood v. Casey*, 505 U.S. 490 (1992). Thus, the plaintiffs undertaking the case had to approach it, in terms of building an adequate factual record, as if it might well be the vehicle for overturning *Roe v. Wade*, 410 U.S. 113 (1973). Finally, the "easiest issue ever confronted" comment by the district court occurred in the course of approving a stipulation to extend the preliminary injunction. This was, of course, long before the great bulk of the attorney effort was undertaken or the case was resolved on the merits.

No. 97-317 (2)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

CARL T.C. GUTIERREZ, in his official capacity as Governor of Guam; the Director of the Department of Public Health & Social Services for the Territory of Guam; the Administrator of the Guam Memorial Hospital Authority; the Attorney General of the Territory of Guam; and the Members of the Guam Election Commission,

*Petitioners*,

—v.—

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; and JOHN DUNLOP, M.D.,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the petition for certiorari filed by petitioners is untimely, and this Court therefore lacks jurisdiction, because it was filed more than ninety days after denial of a petition for rehearing by the court of appeals?

2. Whether the court of appeals properly affirmed a limited multiplier of an attorney's fees award, where the district court found that plaintiffs had difficulty obtaining counsel on Guam because of the undesirability of the case?

3. Whether the court of appeals properly affirmed a decision setting the hourly rates for a New York public interest law firm based on uncontested rate affidavits from private New York law firms?

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Respondents Guam Society of Obstetricians and Gynecologists, et al., respectfully submit the following brief in opposition to the petition for certiorari filed by Carl T.C. Gutierrez, in his official capacity as Governor of Guam, *et al.* [hereinafter "Guam"], docketed on August 21, 1997.

## OPINIONS BELOW

In addition to the opinions below described in the Petition, the court of appeals denied Guam's petition for rehearing and suggestion for rehearing *en banc* by order dated April 16, 1997. That order is reproduced in the Appendix to this Brief at 1a-2a.[1] A second order entered by the court of appeals, and reproduced in the Appendix to the Petition at F-1-4, is reported at 113 F.3d 1089 (9th Cir. 1997).

## JURISDICTION

This Court does not have jurisdiction over this case because the court of appeals denied Guam's petition for rehearing on April 16, 1997. The petition for certiorari was mailed on August 15, 1997, *see* letter to Clerk, 6a-7a, more than ninety days after rehearing was denied, and was docketed on August 21, 1997. Accordingly, the petition for certiorari is untimely under 28 U.S.C. § 2101(c), and this Court lacks jurisdiction. *See* Reasons for Denying the Writ, Point I.

## COUNTERSTATEMENT OF THE CASE

On August 23, 1990, the United States District Court for the District of Guam permanently enjoined enforcement of Guam Public Law 20-134 ("the abortion ban"), which banned virtually all abortions in the territory. *Guam Soc'y of*

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[1] Citations to the Appendix to this Brief are given in the form "_a"; citations to the Petition are in the form "Pet. __"; and citations to the Appendix to the Petition are given by the page number in that appendix.

*Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990). The district court held that the abortion ban violated a woman's fundamental right to choose abortion under *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), *see* 776 F. Supp. at 1428-29 & n.7; that portions of it were void for vagueness, *see id.* at 1428 n.7; and that the solicitation provisions in the law violated the right to freedom of speech, *see id.* at 1429 n.9.

The district court made two other landmark rulings. First, the court unequivocally rejected the Governor's[2] argument "that post-1968 United States Supreme Court decisions in the area of substantive due process right and equal protection have no force and effect in the Territory of Guam." 776 F. Supp. at 1427. In interpreting 48 U.S.C. § 1421b(u), which extends, *inter alia*, the second sentence of section 1 of the Fourteenth Amendment to Guam, the district court held that *Roe v. Wade* applies "with equal force and effect to the Territory of Guam." 776 F. Supp. at 1428. By its ruling on this issue, the district court guaranteed to residents of Guam a panoply of constitutional rights that the Governor of Guam argued they did not have.

Second, the district court held that 42 U.S.C. § 1983 "provides an independent ground to permanently enjoin" the defendants from enforcing the abortion ban. 776 F. Supp. at 1430. In doing so, the district court emphasized the importance of recovering attorney's fees under 42 U.S.C. § 1988: "Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray." *Id.* at 1430 n.14. The district court's decision thus also established the critical principle that civil rights plaintiffs on Guam can avail themselves of the fee-shifting statute that exists for plaintiffs in the U.S. mainland.

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[2] The Governor was the sole defendant who defended the validity of the abortion ban in the district court.

The district court's decision was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1991). The court of appeals held that 48 U.S.C. § 1421b(u) "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded," *id.* at 1369 (footnote omitted), and that 42 U.S.C. § 1983 applies to Guam officials sued in their official capacity for injunctive relief. *Id.* at 1371.

The court of appeals also rejected the Governor's efforts to show that *Roe* had no force after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See* 962 F.2d at 1372-73; *see also id.* at 1372 n.6. Within a week after the court of appeals' decision, this Court heard oral arguments in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The court of appeals opinion was supplied to this Court in a Supplemental Brief by the Petitioners in *Casey*. Despite *Casey*'s clear majority holding re-affirming "*Roe*'s essential holding," 505 U.S. at 840, and less than a month after *Casey* was decided, the Governor of Guam petitioned this Court for certiorari, essentially asking the Court to overrule its decision in *Casey*. This Court denied certiorari. *See* 505 U.S. 1011 (1992).

While the appeal on the merits of the case was pending before the court of appeals, the district court considered plaintiffs' application for attorney's fees and costs under 42 U.S.C. § 1988. In the first attorney's fees proceeding, the district court awarded plaintiffs fees and costs for merits work and the preparation of the fee application, and awarded a multiplier of 2.0 for the merits work of the Guam firm of Arriola, Cowan & Bordallo (AC&B), A-19, but did not enhance the fee award made to the New York-based American Civil Liberties Union Reproductive Freedom Project (ACLU-RFP), the two firms that represented the plaintiffs. A-16.

The district court's first-round fee award was appealed by Guam to the court of appeals. The court of appeals "remand[ed] the case for the district court to reconsider its fee award in light of" *City of Burlington v. Dague*, 505 U.S. 557 (1992), *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992), and *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). B-3. On remand, the district court declined to alter the original award, C-6, justifying its decision not to reduce the multiplier as follows:

> While the risk of the contingent fee did factor into the court's first decision, the more important considerations, as reflected in the decision, were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam.

*Id.* The district court thus reinstated its first award.

Guam again appealed. In affirming the application of a multiplier, the court of appeals held: "Based upon the record in this case, the district court was not clearly wrong in its conclusion that plaintiffs were unlikely to find other local counsel." E-12. Specifically, the court below found that there was no reason to disbelieve evidence showing "that plaintiffs would have found it 'extremely difficult, if not impossible' to obtain experienced local counsel." E-15. The court of appeals also rejected Guam's argument that the district court "abused its discretion in relying on the affidavits establishing rates for private New York attorneys." E-22. Accordingly, the court below affirmed the district court's second-round award of fees with an adjustment to the interest allowed by the district court. E-26.

Guam filed a petition for rehearing with suggestion for rehearing *en banc*. The court of appeals denied the petition for rehearing by Order dated April 16, 1997. That Order was designated "Not for Publication." On May 19, 1997, the

court of appeals withdrew its earlier order and substituted the identical order, this time designated "For Publication." On August 15, 1997, one hundred and twenty-one (121) days after the petition for rehearing was denied, Guam mailed its petition for certiorari to this Court. The petition was docketed on August 21, 1997.

## REASONS FOR DENYING THE WRIT

The petition for certiorari is untimely; thus, certiorari should be denied because the Court lacks jurisdiction. Even if this Court nonetheless assumes jurisdiction over this case, the petition should be denied because Guam has failed to establish any of the factors that weigh in favor of a grant of certiorari. The decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.

### I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION IS UNTIMELY.

Under 28 U.S.C. § 2101(c), "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree."[3] *See also* Sup. Ct. R. 13.1 ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered

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[3] The only exception to the ninety-day time limit is where "[a] justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." *Id.* *See also* Sup. Ct. R. 13.5 (same). Guam neither sought nor obtained such an extension from a Justice of this Court.

by . . . a United States court of appeals . . . is timely filed when it is filed with the Clerk of this Court within 90 days after entry of the judgment"). It is well settled that the ninety-day limit for filing a petition for certiorari is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994) (same). The petition for certiorari was not filed within the ninety-day limit, and this Court therefore has no jurisdiction in this case.

The court of appeals affirmed the district court's award of attorney's fees by decision dated November 7, 1996. *See* E-1. Guam filed a timely petition for rehearing with suggestion for rehearing *en banc*. On April 16, 1997, the court of appeals entered the following order: "The petition for rehearing is denied and the suggestion for rehearing en banc rejected." 1a-2a. The order was designated "NOT FOR PUBLICATION" by the court of appeals.

Thus, the time in which to file a petition for certiorari in this matter ran from April 16, 1997, when the court of appeals denied Guam's petition for rehearing. Rule 13.3 of this Court's rules provides:

> [I]f a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) *runs from the date of the denial of the petition for rehearing* or, if the petition for rehearing is granted, the subsequent entry of judgment.

Sup. Ct. R. 13.3 (emphasis added). *See also Jenkins*, 495 U.S. at 45-46. Guam's time to file a petition for certiorari expired on July 15, 1997 (a Tuesday), ninety days after "the date of the denial of the petition for rehearing."

On May 19, 1997, the court of appeals entered a second order. That order stated: "The Order filed on April 16, 1997 is withdrawn. The panel will redesignate that same Order as being 'FOR PUBLICATION' and will file it." F-1. Because the May 19, 1997 Order is, aside from this statement, *identical* to the April 16, 1997 Order denying the petition for rehearing, it did not extend Guam's time to file its petition for certiorari beyond July 15, 1997.

In *F.T.C. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952), this Court assessed the timeliness of a petition for certiorari in a case in which the court of appeals had entered two "judgments," one dated July 5, 1951, called a "judgment," and a second issued on September 18, 1951, labeled a "Final Decree." *See id.*, 344 U.S. at 212. There, the two "judgments" differed slightly, *see id.* at 209-10; here the two "judgments" in question are identical, except for the language quoted above in the second judgment *stating*, in essence, that the second order is the same as the first. This Court decided, in a holding directly applicable to this case, that:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

*Id.* at 211-12. *Cf. F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965) (second opinion of court of appeals

"resolved a genuine ambiguity," hence "time within which certiorari had to be requested dates from the second judgment").

Here, the May 19 Order by the court of appeals not only changed no "matters of substance," it actually changed *nothing* in the prior order, except to redesignate it "for publication." No legal rights or obligations were "disturbed or revised" by the May 19 Order. Thus, under *Minneapolis-Honeywell*, the "period within which . . .[the] petition for certiorari [must be] filed" did *not* run anew from the May 19 Order, but from the original April 16, 1997 Order. *See also Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("If the court did no more by the second judgment than to restate what it had decided by the first one, . . . the 90 days would start to run from the first judgment."). Since the petition was filed beyond the statutory time limit of July 15, 1997, without any extension of time granted by a Justice of this Court, this Court lacks jurisdiction to consider it. *See generally* ROBERT L. STERN et al., *Supreme Court Practice* at 278 (7th ed. 1993) ("This jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained.").

## II. SHOULD THIS COURT ASSUME JURISDICTION OVER THE PETITION, IT SHOULD NEVERTHELESS BE DENIED.

Even assuming, *arguendo*, that this Court has jurisdiction, the Court should deny the petition for certiorari. The petition raises four questions, three of which relate to the affirmance of a 2.0 multiplier of the fee award to AC & B. The fourth question addresses the hourly rates set by the district court for the ACLU attorneys and affirmed by the court of appeals. Guam's arguments on these questions raise no important federal questions that should be settled by this

Court, and consideration of them by this Court should therefore be rejected.

### A. The Affirmance By The Court Of Appeals Of An Enhancement Of AC&B's Lodestar Raises No Important Question That Should Be Decided By This Court.

Guam argues that three grounds favor review by this Court of the multiplier affirmed by the court below. First, the multiplier was awarded for factors "subsumed in the loadstar [sic]." Pet. at 8. Second, the evidence of actual difficulties in finding counsel was insufficient to justify the award, and the evidentiary standard applied by the court below differs from that employed by other courts of appeals. Pet. at 12. Third, approval of the multiplier results in an award that is "unreasonable and punitive in nature." Pet. at 18. None of these arguments present significant issues of national import that merit this Court's review.

#### 1. The Court of Appeals' Opinion Does Not Conflict With This Court's Precedents or Other Circuit Decisions.

Contrary to Guam's argument, the court of appeals did *not* ignore this Court's holding in *Dague* that contingency may not be used as a basis for enhancing the lodestar. The court of appeals, instead, properly held that difficulty in obtaining counsel -- the primary basis for the district court's enhancement of the AC&B lodestar -- is not subsumed within contingency. *See* E-9-10.

This holding is consistent with this Court's precedents that an upward adjustment of the lodestar must be necessary to arrive at a reasonable award. *Dague*, 505 U.S. at 562; *Blum v. Stenson*, 465 U.S. 886, 898 (1984). This Court's decision in *Dague* simply eliminated "contingency" as a factor which could be used to justify an upward adjustment. But while contingency relates to the risk of nonpayment,

difficulty in obtaining counsel is independent of the merits of a case. In this case, the district court made findings of fact that fully support the conclusion that plaintiffs could not have obtained other Guam counsel. *See* E-13 (quoting district court findings regarding unanimity of vote for law in Guam Legislature, Governor's personal support of law, threats of excommunication of opponents of law, and death threats received by Ms. Arriola); *id.* at n.7 (detailing death threats and Guam police response). Nothing in this Court's decisions conflicts with enhancement of an attorney's fee award based on such facts.

Nor does the decision of the court below conflict with decisions of other United States courts of appeals. Rather, those courts have recognized that *Dague* still permits upward adjustments to the lodestar for non-contingency factors. For example, in *Grant v. Martinez*, 973 F.2d 96 (2d Cir. 1992), *cert. denied*, 505 U.S. 1053 (1993), the court wrote, "[a]lthough there is a strong presumption that the lodestar figure represents the reasonable fee, other considerations may lead to an upward or downward departure from the lodestar." *Id.*, 973 F.2d at 101 (internal quotations and citations omitted). Similarly, the Fifth Circuit in *Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir.), *cert. denied*, 114 S. Ct. 548 (1993), concluded that enhancement based upon the results obtained may have been warranted, and remanded the case to the district court for recalculation, *id.* at 323, while specifically holding that *Dague* ruled out contingency-based enhancements. *Id.* The First Circuit has also recognized an exception allowing enhancements after *Dague* for "exceptional performance/results." *Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992) ("there exists a strong presumption, not an outright ban" against such enhancements). *See also Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994) (recognizing category of "rare and exceptional case[s] where an upward adjustment of the lodestar is called for because of exceptional success");

*Cooper v. Pentecost*, 77 F.3d 829, 833 (5th Cir. 1996) (recognizing that "in certain exceptional cases" it is appropriate to "enhance the lodestar").

Indeed, the only case cited by Guam as representing a "direct conflict" with the decision of the court below presents no conflict at all. In *Walker v. United States Department of Housing and Urban Development*, 99 F.3d 761 (5th Cir. 1996), the court discussed "the 'undesirability' of the case," *id.* at 771, the factor relied upon by the court below, without indicating that it could not form the basis for an enhancement of the lodestar. Rather, the court held that the district court's findings of undesirability were based on "earlier litigation in [the] case," rather than the undesirability of present work for which an enhancement was at issue.[4] Because the *Walker* court noted that the lower court failed to make appropriate findings on this issue, it actually *supports* the proper use of undesirability as a basis for upward adjustment of the lodestar. Thus, Guam has pointed to no conflict between the decision of the court below and the decisions of other courts of appeals or this Court.

**2. The Court of Appeals' Assessment Of The Evidence Supporting A Finding Of Undesirability Does Not Merit This Court's Review.**

Guam next contends that, even if undesirability and difficulty in obtaining Guam counsel could justify an upward adjustment of the lodestar, there was insufficient evidence justifying these findings. This is not a basis for seeking certiorari, because this Court will generally not review

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[4] *Walker* correctly recognizes that this Court has "barred" use of "the contingent nature of the fee" in adjusting the lodestar. 99 F.3d at 772. But it also recognizes that other factors are not barred by this Court, though the use of some has been "limited greatly" by this Court. *Id.* at 771. Not only has undesirability as a factor not been barred by this Court according to *Walker*, it is not even among the factors "limited greatly."

questions of fact. *See, e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (finding that grant of certiorari was "improvident" because "we are presented primarily with a question of fact, which does not merit Court review").

That difficulty in obtaining counsel *was* a question of fact is made very clear by the opinion of the court below. The court cited one affidavit stating that the position of the Catholic church on abortion and the class action nature of the lawsuit would have made it difficult for plaintiffs to find experienced Guam counsel, *see* E-11; another affidavit simply stated that plaintiffs would not have had difficulty obtaining Guam counsel because "the plaintiffs in a Guam asbestos class action suit had no difficulty obtaining local counsel." E-12. The court of appeals properly concluded that the district court did not clearly err in choosing to believe one affidavit rather than the other, especially because the basis for the first opinion seemed more relevant. *Id.* This weighing of the evidence and its probity are not appropriate for review by this Court.

Guam suggests further that the analysis used by the court of appeals' assessment of the evidence conflicts with this Court's decision in *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990). But *Triplett* is completely inapposite. It did not reject the use of "anecdotal evidence" in *attorney's fees litigation*. Instead, it rejected the use of anecdotal evidence about unavailability of attorneys where that evidence was used to invalidate a program established by Congress. *Id.* at 723. Moreover, *Triplett* did not involve award of a multiplier, and it simply has no bearing on the decision of the court below.

Guam also claims that a conflict exists between the decision of the court below and the decisions in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992), and *Huntington Branch, N.A.A.C.P. v.*

*Huntington, N.Y.*, 961 F.2d 1048 (2d Cir. 1992). In *King*, the court required a showing of "actual difficulties" in obtaining counsel in the context of "contingency enhancements." 950 F.2d at 778. But the court below found that there was sufficient evidence of difficulty in obtaining counsel to support an enhancement *apart* from contingency. Moreover, even *King* recognized that other Circuits take different approaches to the evidence required to support a finding of difficulty in obtaining counsel. *Id.* (citing *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991), as case "stating that no actual difficulties need be shown").

*Huntington* is likewise not in conflict with the decision of the court below. There the court held that fee enhancement is not necessary when plaintiffs are represented by an organization whose purpose is to provide legal help to the indigent. *Id.* at 1050-51. AC&B, a private, commercial Guam firm, is not an organization dedicated to serving the indigent. Thus, *Huntington*, by its own terms, is distinguishable from this case. Moreover, as in *King*, the discussion in *Huntington* is entirely in the context of difficulty in obtaining counsel because of "the risk of nonpayment," 961 F.2d at 1050, i.e., contingency. Thus, *Huntington*, like *King*, does not purport to apply to difficulty in obtaining counsel because of the controversial and volatile nature of the case.

Because Guam has failed to identify any direct conflict on any important matter between the decision of the court below and the decision of another court of appeals or this Court, and because Guam presents only matters of evidence, review by this Court is not warranted.

### 3. The Decision Of The Court Below Is Not Punitive Or Exorbitant.

Lastly, Guam argues that the fee award as affirmed by the court of appeals is "exorbitant" and that the court below

therefore improperly "punished" Guam. *See* Pet. at 19. This argument quite simply states no ground upon which this Court should grant certiorari.

It is well-settled that the purpose of 42 U.S.C. § 1988 is, at least in part, to "encourage compliance with and enforcement of the civil rights laws." *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (footnote omitted). Indeed, "assessing fees against defendants . . . may deter wrongdoing in the first place." *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Because the fee award in this case is reasonable and serves the function of encouraging Guam to comply with the Constitution, it is entirely consistent with the purpose of 42 U.S.C. § 1988.

Furthermore, this case established, over Guam's strenuous opposition, the broad principle that all of Guam's residents are protected by the Due Process Clause of the Fourteenth Amendment, including *Roe v. Wade*. It also established, through the applicability of § 1988, effective access to the judicial process for civil rights grievances. These results benefit Guam taxpayers, and if Guam must pay what has been determined to be a reasonable attorney's fee for resisting these results, that consequence is not punitive, it is entirely appropriate.

### B. The Affirmance By The Court Below Of A Fee Award For ACLU Attorneys Based On Rates Billed By Private New York Firms Is Entirely Consistent With This Court's Precedents.

The argument that New York hourly rates for the ACLU attorneys should not apply was waived by Guam long ago in this litigation. The court of appeals never addressed the propriety of New York hourly rates for the ACLU attorneys, because the district court's ruling on this issue was never

appealed to the court of appeals, even in the first-round fee appeal.[5]

As the court of appeals wrote, Guam "do[es] not contend that New York is not the relevant community for determining the prevailing market rate [for the ACLU attorneys]." E-21. Because Guam did not raise this matter in the court below, it is barred from urging it now in this Court. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised . . . in the lower court.").

Even if Guam is permitted to revive an argument it waived below, the issues relating to the ACLU attorneys' hourly rates do not merit this Court's review. There is not, as Guam contends, a "direct conflict," *see* Pet. at 20, between the decision of the court below and *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995). *Hadix* rejected a fee award at higher "out-of-town" hourly rates, finding that petitioners failed to show that "it was necessary to resort to an out-of-town specialist." *Id.* at 535. In this case, the district court found that the ACLU attorneys "have unique experience and skill in [abortion rights] cases, and can marshal resources not available on Guam." A-12. Further, *Hadix* involved an out-of-town specialist brought in to monitor a consent decree, and the court found that "her expertise was [not] necessary in this phase of the . . . litigation." 65 F.3d at 535. The *Hadix* opinion does not conflict with the opinion of the court below.

Guam next argues that, even if New York hourly rates apply, this Court should review the decision of the court below because the ACLU "did not submit any evidence" of what it "normally charges in cases such as this one." Pet. 22.

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[5] While it is true that Guam *initially* "opposed the rates requested by ACLU," Pet. at 22, it never pursued its opposition after the district court's first attorney's fees ruling of June 25, 1991.

This argument is meritless. *Blum v. Stenson*, 465 U.S. 886 (1984), held that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Id.* at 895 (footnote omitted). Because of "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters," an award of attorney's fees under § 1988 is entitled to substantial deference. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Guam's claim that the district court made a factual error in determining the prevailing market rate, and that the court of appeals created an "important federal question" in affirming that error, simply does not warrant this Court's attention. As this Court has long held, "We do not grant a certiorari petition to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: September 22, 1997.

Respectfully submitted,

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**NOT FOR PUBLICATION**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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|---|---|
| GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS, GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; and JOHN DUNLOP, M.D.; on behalf of themselves and all others similarly situated, and all their women patients, | No. 94-15070 |
| Plaintiffs – Appellees, | D.C. No. CV-90-00013-ARM (District of Guam) |
| v. | ORDER [Filed Apr. 16, 1997] |
| JOSEPH F. ADA, in his personal and official capacities, et al., | |
| Defendants – Appellants. | |

Before: PREGERSON, KOZINSKI and HAWKINS, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**Guam Society of Obstetricians and Gynecologists, et al. v. Ada, No. 94-15070** [Filed Apr. 16, 1997]

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI and KLEINFELD, Circuit Judges, join, dissenting from the order rejecting the suggestion for rehearing en banc.

A district court may award the prevailing party in a civil rights action "a reasonable attorney's fee." 42 U.S.C. § 1988. A "reasonable fee" is "reasonable compensation," usually a reasonable rate multiplied by a reasonable number of hours. See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). It is not meant to be a "windfall," Blum v. Stenson, 465 U.S. 886, 897 (1984), nor is it "economic relief to improve the financial lot of lawyers," City of Burlington v. Dague, 505 U.S. 557, 562-63 (1992).

This case called upon the district court to decide whether Guam's ban on abortions was unconstitutional under Roe v. Wade-- not exactly rocket science. The district judge considered it "the easiest issue that [he'd] ever been confronted with." Plaintiffs' counsel nevertheless claimed that 1,487 billable hours were reasonably necessary to secure this judicial breakthrough. Surprisingly, the district judge agreed, and awarded counsel $175 for each one of those 1,487 hours. Our divided court affirmed the award, citing statements of Guam attorneys that $175 per hour or more was reasonable given "the magnitude and controversy" of the case and "the considerable hostility the suit engendered in the community." **[2]**

In my view, this kind of bounty to litigate the self-evident proposition that Guam's ban on abortion violates Roe creates perverse incentives for attorneys to run up hours in cases that barely pass the laugh test. As if that were not enough,

however, the district court proceeded to double the amount, producing a total award of $443,642.56.

We should rehear this case en banc solely on the exceptional importance of remedying such a flagrant abuse of a district court's discretion. Perhaps the more compelling reason to rehear it, however, is to maintain uniformity of decisions. In the Supreme Court's view, one that we are not at liberty to ignore, section 1988 does not authorize such unreasonable and duplicative awards.

The district judge doubled the award on the ground that no other attorney on Guam would have taken the case due to its difficulty and undesirability. He relied on vague declarations submitted by local attorneys that an inflated fee was warranted because local attorneys would not represent plaintiffs due to anti-abortion sentiment on the island. Though the irony of that reliance is almost too much to bear, we need not dwell on it. A district court simply cannot use the difficult and controversial nature of a case both to calculate a reasonable fee and then to enhance it. It's called "double counting," and it's not allowed. Dague, 505 U.S. at 562-63. The Supreme Court explained in no uncertain terms that a district judge may not enhance the lodestar based on difficulty because difficulty necessarily is reflected in a reasonable hourly rate or a reasonable number of hours. Blum, [3] 465 U.S. at 898-99. A district judge likewise may not enhance the lodestar due to undesirability after he inflates the hourly rate to reflect undesirability.

What the district judge did in this case flies straight in the face of what the Supreme Court says judges cannot do. The dissent to our panel's opinion emphasized how the district court "did not conceal its disdain for defendants' arguments." Quite frankly, I cannot tell whether our circuit has rejected the Supreme Court's moratorium on double counting for "controversial" cases or just allowed political correctness to run amok. Either way, I dissent. [4]

**Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al., No. 94-15070** [Filed Apr.16, 1997]

HAWKINS, Circuit Judge, concurring in the order rejecting the suggestion for rehearing en banc:

The Court rejected the en banc suggestion in this matter and for good reason. The appeal concerned the issue of attorney's fees: a matter particularly within the discretion of the district court that heard the case from start to finish. It is not surprising that 1,487 hours were approved by the district court, for some 97% of them were not contested by the opposing parties. The application of the multiplier also brought the hourly rates to a level for which there was ample support in the record. And while some may feel the case did not involve "rocket science," it is well to remember that the underlying litigation occurred after Webster v. Reproductive Health Services, 492 U.S. 480 (1990), but before Planned Parenthood v. Casey, 505 U.S. 490 (1992). Thus, the plaintiffs undertaking the case had to approach it, in terms of building an adequate factual record, as if it might well be the vehicle for overturning Roe v. Wade, 410 U.S. 113 (1973). Finally, the "easiest issue ever confronted" comment by the district court occurred in the course of approving a stipulation to extend the preliminary injunction. This was, of course, long before the great bulk of the attorney effort was undertaken or the case was resolved on the merits.

August 15, 1997

William K. Suter, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Guam Society of Obstetricians and Gynecologists, et al. v. Carl T.C. Gutierrez, Governor of Guam, et al., No. 94-15070 (9th Cir. May 19, 1997)

Dear Mr. Suter:

Buenas yan Saluda!

Enclosed please find 40 copies of the Petition for Writ of Certiorari and a check in the amount of $300.00 for the Rule 38 docket fee.

The Governor of Guam, in his official capacity, is filing a Petition for Writ of Certiorari in the above case to review the Ninth Circuit's decision regarding an award of attorney fees.

The following are the named defendants in the decision and order awarding attorney fees in this suit: Dr. Leticia Espaldon, Director of Public Health, George B. Palican, Administrator of Guam Memorial Hospital Authority, Elizabeth Barrett-Anderson, Attorney General, Gloria B. Nelson, Thomas J.B. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael Phillips, as the Board of Directors of the Guam Election Commission in their official capacities. Guam Society of Obstetricians and Gynecologists et al v. Ada, 776 F. Supp. 1422 (D. Guam 1990)

The District Court dismissed Joseph F. Ada in his individual capacity from the suit. The Department of Public Health and

Social Services and the Office of the Attorney General are line agencies of the government under the supervision of the Governor of Guam. [2]

The Guam Memorial Hospital Authority and the Guam Election Commission are government entities under the supervision of their own board or commission.

All those named government officials, who were sued in their official capacities, have been replaced by successors in office. Joseph F. Ada has been replaced as Governor by Carl T.C. Gutierrez. Therefore, pursuant to Rule 35.3 and 35.4 of the Rules of the Supreme Court of the United States, Carl T.C. Gutierrez has been substituted for Joseph F. Ada as Governor of Guam and the official titles have been substituted for the names of the other government officials.

Adios.

Sincerely,

MARIA G. FITZPATRICK
Assistant Attorney General
Civil Division

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